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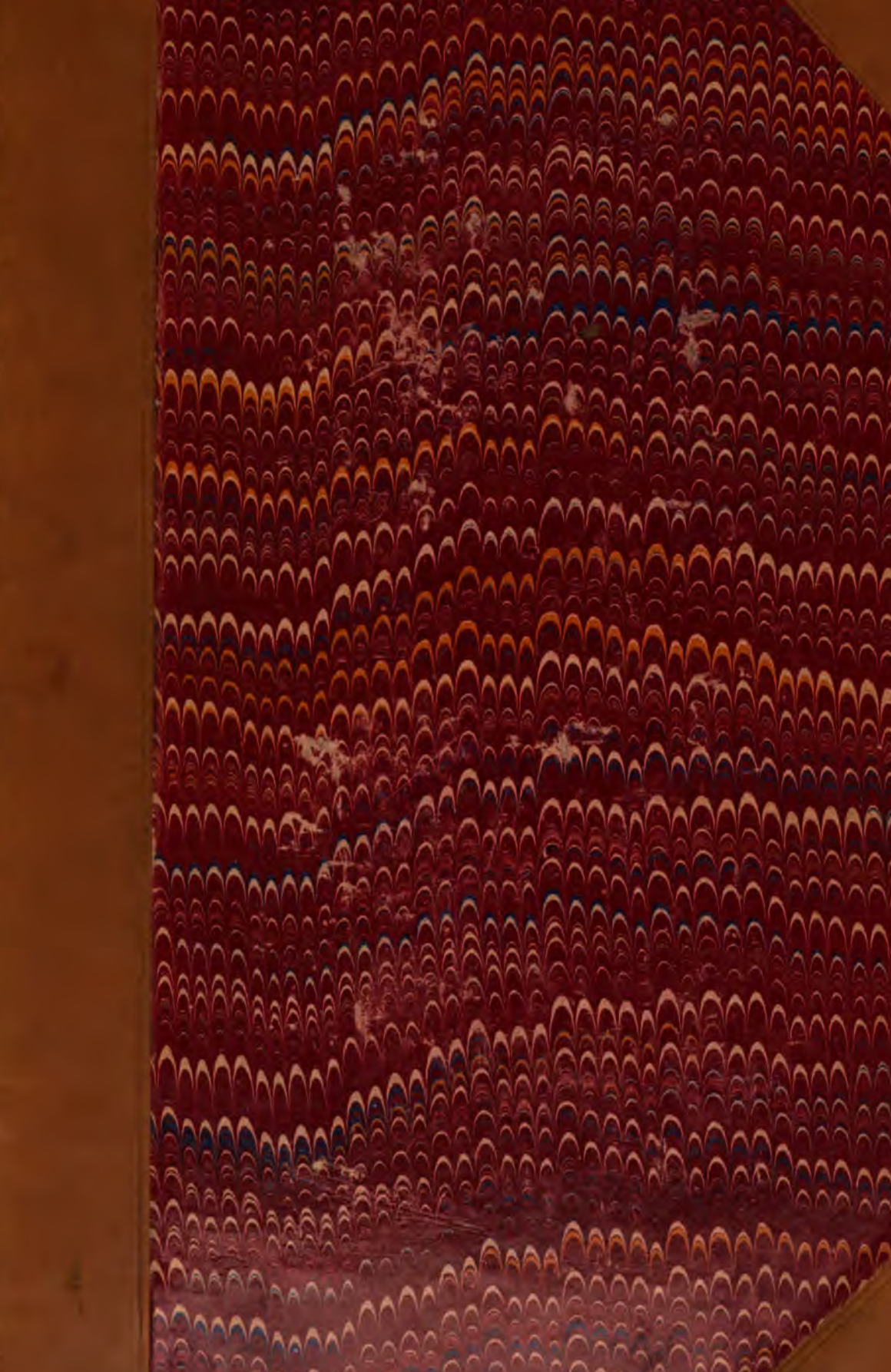

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CORRIGENDA.

Page 360, line 2 from foot of page, for 'not' read 'only.'

Canadian Criminal Cases.

Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada and of the Provinces thereof.

[SUPERIOR COURT FOR THE DISTRICT OF MONTREAL.]

TRIAL BEFORE LYNCH, J., HEARING ON REVIEW BEFORE TASCHEREAU, MATHIEU AND LORANGER, JJ.

CLERMONT v. LAGACÉ.

Assault—Civil Action—Conviction as Bar—Cr. Code 866.

1. Cr. Code, 866, does not apply to bar a civil action for assault, after conviction and payment of the fine, where such conviction is by a petit jury on a trial upon an indictment.

Civil action for damages for assault.

The defendant had been arrested on a charge laid under article 241 of the Criminal Code, 1892, by a brother of the plaintiff (acting with the latter's consent), for unlawful wounding of the plaintiff by the defendant, with intent to do grievous bodily harm. He was committed for trial to the Court of Queen's Bench, and was there found guilty of common assault, and fined $20, which he paid. The civil action was brought in respect of the same acts and circumstances upon which the criminal prosecution had been founded.

It was argued for the plaintiff: (1) That Cr. Code, article 866, must be read in conjunction with articles 864 and 865; the evident intention is that it applies only where the com-

plainant has lodged a complaint before a justice for assault and battery, intending to submit to the summary jurisdiction of the magistrate. (2) The charge here was not one for common assault, and could not be disposed of summarily, and therefore article 866 does not apply. (3) The present plaintiff was not the complainant, and his action is not barred by a complaint laid by his brother, although the latter acted with the plaintiff's consent. (4) Article 866 of the Criminal Code is *ultra vires*, as it purports to affect "civil rights," the legislative jurisdiction regarding which is with the provincial legislatures and not with the Federal Parliament. The original enactment was 4-5 Vict. (Can.) c. 27, s. 28, which was reproduced in Con. Stat. of Canada (1859) c. 91, s. 44, and 32-33 Vict. (Can.) c. 20, s. 45. (5) That section 44 could not be revived by the latter Act which repeals chapter 91 *in toto*, for the power had in the meantime become vested in the Province, and that *Pingault* v. *Symmes* (1883) 7 Montreal Legal News 3, wrongly assumes that 32-33 Vict. (Can.) left the civil claim as it was previously.

For the defendant it was argued: (1) That Cr. Code, 866, absolved the defendant from civil liability for the assault. (2) That the plaintiff had the option of either criminal or civil proceedings, and chose to have recourse to the criminal tribunal, and that the defendant having paid the fine the Code protects him from a second punishment for the same cause.

MONTREAL, April 23, 1897.

The following judgment was ordered by

LYNCH, J.—

The Court having heard the witnesses produced by the parties, having heard their counsel on written factums, having examined the proceedings and proof of record, and having deliberated thereon.

Seeing that plaintiff's action is brought to recover the sum of $999.99 for damages suffered by him in consequence of a

serious assault committed upon him by defendant at Cartierville, in said district, on the 30th day of December, 1895;

Seeing defendant's plea by which he denies the allegations of plaintiff's declaration, and alleges that by law he is released from any further liability, civil or criminal, inasmuch as having been convicted before the Court of Queen's Bench, Crown side, at Montreal, for the same cause, he has paid the sum adjudged against him, and that he is not responsible for the injuries sustained by the plaintiff, inasmuch as the latter provoked the difficulty and was the cause of the trouble;

Considering that the provisions of article 866 of the Criminal Code, 1892, apply only to a conviction pronounced by a Justice of the Peace, in the exercise of his summary jurisdiction, upon complaint of a person who has been unlawfully assaulted or beaten, or on his behalf, and not in the case when the defendant was found guilty of an assault by the petit jury, at his trial on an indictment charging him with unlawfully wounding with intent to do some grievous bodily harm;

Considering that although plaintiff's language and actions were of a nature to exceedingly annoy and provoke the defendant, the latter was not justified in the harsh and excessive treatment administered to plaintiff, and that he was largely responsible for the serious consequence which resulted to plaintiff;

Considering all the circumstances, and taking into account plaintiff's own conduct, it is by the Court estimated that plaintiff should recover from defendant the sum of $200.00 as damages;

Doth condemn defendant to pay plaintiff said sum of $200.00 with interest from this day and costs, etc.

MONTREAL, March 4, 1898.

On the hearing "en revision" before Taschereau, Mathieu and Loranger, JJ., the above judgment was affirmed.

Saint Pierre, Pelissier & Wilson, attorneys for plaintiff.

Desmarais & Cordeau, attorneys for defendant.

Note: *Assault—Civil action—Conviction as bar.*

A summary conviction for "assault occasioning bodily harm" and the payment of the fine imposed has been held in Ontario not to bar a civil action. *Nevills* v. *Ballard* (1897), 1 Can. C.C. 434; but in the Province of Quebec it was held by Archibald, J., that upon a conviction by a magistrate under Cr. Code, sec. 783, on a charge of having committed an "aggravated assault by unlawfully and maliciously inflicting upon another person grievous bodily harm," the civil action was barred on payment of the fine. *Hardigan* v. *Graham* (1897), 1 Can. C.C. 437.

If the complaint is not preferred by or on behalf of the person aggrieved, but by a constable of his own motion, and the person assaulted merely gives evidence at the hearing, his right of action will not be barred. *Miller* v. *Lea* (1898), 34 Can. Law Jour., 782 (C. A., Ont.)

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., AND ROBERTSON, J., SITTING AS A DIVISIONAL COURT.

THE QUEEN v. HUGHES.

Club—Sale of liquors by—Liquor License Act (Ont.)—"Keeping liquors for sale —Certiorari—Review of facts where no appeal.

1. The steward of an incorporated club placed in charge of liquors purchased by the club for the use of the members and authorized to allow members only to withdraw liquor from the stock upon payment according to a rate fixed by the directors as sufficient to replace the quantity withdrawn, is, in carrying out such instructions without a liquor license, guilty of illegally keeping liquor for sale contrary to the Ontario Liquor License Act.
2. A withdrawal of liquor from stock by a member or shareholder is under such circumstances a sale by the corporation to him.
3. *Semble* that, whether or not a conviction be good on its face, the court may on certiorari go into the facts, where the right of appeal to the General Sessions upon both law and fact has been taken away by statute.

ARGUED : January 26, 1898.

DECIDED : February 8, 1898.

Motion to quash the conviction of Horace Hughes by the deputy police magistrate of the city of Toronto, made on July 23rd, 1897, for that he on May 1st, 1897, at the said city of Toronto, unlawfully did keep liquor for the purpose of sale, barter and traffic therein without the license therefor by law required.

The defendant was the steward of the Wanderers' Bicycle Club, incorporated under R.S.O. (1887), ch. 157, and at the trial of the information on which the defendant was convicted, the president of the club produced a resolution passed at a club meeting on November 23rd, 1896, "that an amount necessary to purchase a stock of liquor be expended equal to the demand or need of the shareholders, to be placed in the club premises, and the steward to be appointed custodian of the same. Instructions also to be given to him not to allow

anybody but a paid-up shareholder to withdraw liquor from the stock, and only such an amount as is called for on an authorized certificate from the secretary or the treasurer or their authorized deputy, which said shareholder will present on withdrawal. * * And at the time that any shareholder applies for these certificates he must pay to the secretary-treasurer, or their deputy, such an amount as will replace in the general stock the amount to be withdrawn, collecting from the shareholder what is necessary to replace that withdrawn in such an amount that will include not only the cost of the goods, but what in the estimate of the secretary-treasurer, or the directors, will be sufficient above cost to meet the cost from breakages and extra expense in handling."

He also testified: "It was the money of the club that was used to supply the first stock of liquor. The certificate spoken of in the resolution is a ticket, and we give five of them to a member for twenty-five cents. If I took a guest in I could get two tickets on which I could get two drinks, and present one of them to my guest, and if I liked I could give him both drinks. The liquor is in charge of the steward, overlooked by a board, to whom he can refer any matter or who can investigate anything in reference to his conduct. The steward is the one who decides in all ordinary cases as to whether the member shall be supplied on his ticket or not, and he is the occupant of the premises for that purpose. The steward knows the members well. Refreshments are served to members only."

In the club charter it was provided:—

"And we further direct and this charter is granted upon the condition that this charter shall be forfeited and may be cancelled by our Lieutenant-Governor in Council should the said club or the manager, directors, committees or steward or any member thereof, or any other person with the assent, or the acquiescence or permission of the said club, the manager, directors, committees or steward or members thereof, deal in, barter, traffic in or sell or dispose of alcohol, spirits or other spirituous, malt or intoxicating liquors upon the premises of the said club; And this charter is accepted upon this condition

and upon the terms that any person so dealing in, bartering, trafficking in or selling, or disposing of any such spirituous, malt or intoxicating liquors upon the said premises, whether he be a member, servant or agent of the said club or not, shall be guilty of an infraction of the Liquor License Act and of selling intoxicating liquors without the necessary license authorizing or permitting such sale and shall incur the penalties by the said Act provided, and shall be otherwise amenable to all the provisions of the said The Liquor License Act and the amendments thereto, and a plea in such case that such sale or other violation of the said Act took place by a member of the said club to a member thereof, or that the said club was duly incorporated, shall not be made, received or entertained, and the said club, member, officer, servant or agent shall be estopped from preferring the same."

Ritchie, Q.C., for the defendant, contended that *Reg.* v. *Slattery* (1894), 26 Ont. R. 148, was precisely in point, and that clubs incorporated under the Ontario Joint Stock Companies Act, as the club in question here was, do not come within the Liquor License Act at all: R.S.O. (1887), ch. 194, sec. 53, as amended by 53 Vict. ch. 56, sec. 4 (Ont.).

J. R. Cartwright, Q.C., for the prosecutor, contended that the magistrate was entitled to infer as he did do, that though the club may have bought the first stock of liquor, they then left it to the defendant to do the best he could: *Reg.* v. *Cunerty* (1894), 26 Ont. R. 51; *Reg.* v. *Charles* (1894), 24 Ont. R. 432; that the club let to the steward the part of their premises where the liquor was sold; that if he was selling as their servant, this was in direct violation of their charter; and that he came under R.S.O. (1887), ch. 194, sec. 112, as amended by 56 Vict. ch. 40, sec. 4.

Langton, Q.C., on the same side, contended that the conviction being good on its face, the evidence could not be looked at: *Reg.* v. *Coulson* (1893), 24 Ont. R., at p. 249; *Reg.* v. *Cunerty* (1894), 26 Ont. R., at p. 53; and that if otherwise, the Court would not interfere if there was anything on which the magistrate could have found as he did.

[*Per* BOYD, C. :—It may be that where a conviction is good on its face and there is an appeal to the General Sessions, the Court will not go into the facts ; but it is a serious thing and a doubtful thing to say, that the Court will not do so, even though the conviction be good on its face, where as in this case there is no such appeal. It would be giving a great opening for injustice on the part of the magistrate.]

Langton.—The club members cannot be said to have been buying from themselves ; they bought from the corporate body, paying by tickets. The words of the Act extend to 'dealing in' ; *Commonwealth* v. *Smith* (1869), 102 Mass. 144 ; *Newell* v. *Hemingway* (1888), 58 L.J. M.C. 48.

Ritchie, in reply : The provision in the charter does not affect the defendant, nor the provisions of the Liquor License Act ; the head note in *Reg.* v. *Coulson* (1893), 24 Ont. R. 249 is misleading, or the judgment bad law if it went so far : *Reg.* v. *Coulson* (1896), 27 Ont. R., at p. 59 ; *Graff* v. *Evans* (1881), 8 Q.B.D. 373.

TORONTO, February 8th, 1898.

BOYD, C.—

There is evidence sufficient to justify the magistrate's conclusion that the liquors were in possession of the defendant for purposes of sale. Though the whole building may be under lease to the Wanderers' Club their keeping liquors would be a violation of their charter. Therefore, it may be well supposed that the particular place in the building where the liquors were kept was in the hands of the defendant, who it is said in the evidence, decided in all ordinary cases as to supplying the member on his ticket or not, and who was the occupant of the place for that purpose. I do not think we should nicely scrutinize the penetralia of the club or the precise method by which it was sought to evade the stipulations of the charter—that liquor was not to be kept by the club.

The room in question was fitted up like a bar—the defendant was in visible possession controlling the stock of

liquors therein—the beer was there to be disposed of for an equivalent received by the defendant from those who had the right of entry. As between the club and this defendant there was some arrangement by which he was in possession and control of this room pursuing the illicit employment of disposing of liquor without license, and in violation of the letters of incorporation. The defendant was the agent of the corporation in charge of this particular place in the leased premises where liquor was kept. The corporation could not personally occupy, but in their stead the steward was the custodian and occupant. The liquors probably belonged to the corporation, but the drinks were sold to individual members and others who had tickets. This distinguishes the case from *Graff* v. *Evans* (1881), 8 Q.B.D. 373, where the club was legally a partnership, and there could be in law no sale from one to the other member of the common stock. No question was raised there that the conviction of the individual manager was right, if the transaction amounted to a sale. The distinction between this and one where the proprietor is distinct from the members (as here) is noted in Daly on Club Law, 2nd ed., pp. 103-4.

Upon the American decisions which are more conformable to the trend of liquor legislation in this province (see sec. 53 of the Liquor License Act, R.S.O. 1887, ch. 194) than the English cases, there is no doubt that what was done in the present case was selling liquor within the meaning of that word as used in the Liquor License Act; *People* v. *Andrews* (1889), 115 N.Y. 427; *People* v. *Soule* (1889), 74 Mich. 250; *State* v. *Essex Club* (1890), 20 Atl. R. 769.

Then there is evidence to justify the finding that this defendant was keeper of the room for the purpose of selling the liquor stored there. Sections 50, 108 and 112 R.S.O. 1887, ch. 194, are to be read together. And upon the meaning of the word "keeping" the house or the room or place, this does not necessarily imply property, but may signify share of government or control: see *The Queen* v. *Williams* (1712), 10 Mod. 63; *S. C.* 1 Salk. 384.

A servant or agent in charge of such a place may be con-

victed of keeping it by a jury or justice of the peace ; *Commonwealth* v. *Burke* (1873), 114 Mass. 261 ; *Newman* v. *Jones* (1886), 17 Q.B.D. 134.

Altogether I would not interfere with this case, but would dismiss the rule nisi with costs.

ROBERTSON, J.—

After consulting the Liquor License Act and its several amendments, and after reading the charter of incorporation of the Wanderers' Bicycle Club, and reading the evidence given before the magistrate, I am of opinion that the conviction of the defendant was right ; the application, therefore, to quash that conviction should be refused.

Motion dismissed.

Note : *Liquor License Law—Club—Disposal to Members—Steward of Club.*

Where a company was incorporated to establish a driving park and club house on certain lands, and, subject to the Liquor License Act, to maintain the same for social purposes "and generally to do all things incidental or conducive to the objects aforesaid," it was held that the company was not authorized to establish a club house elsewhere than at the place specifically mentioned in the charter. The club was nominally the occupant of a building elsewhere in charge of the secretary and steward, and liquor was there sold to members, and it was held that the steward was in law a person in possession of the liquors there for purposes of sale and might be properly convicted. *R.* v. *Charles* (1893), 24 Ont. R. 432, (C. P. D.)

If the supply of liquors is part of the object for which a club is incorporated, and is within the purview of its articles of association or charter, the manager who performs the duty of distributing the club's liquors among the members at a fixed price, which is one source of means to carry on the club, is not by so doing guilty of "selling or exposing for sale by retail intoxicating liquor." *Newell* v. *Hemingway* (1888) 58 L. J. M. C. 46 (Coleridge, C.J., and Manisty, J.)

Note—*Continued.*

The handing over of liquors by the manager of a club to the general body of members is not a sale. *Graff* v. *Evans*, (1882) 51 L.J.M.C. 25, 8 Q.B.D. 373; *R.* v. *Hodgins*, (1892) 24 Ont. R. 433.

A power to provide a club house and other conveniences for the use of the club includes a power to supply liquors to members. Per Coleridge, C.J., in *Newell* v. *Hemingway*, (1888) 58 L.J.M.C., 46, 48.

The supply of liquor to a person not a member of the club, at his expense, is an illegal sale although he goes through the form of paying through a member. *Stevens* v. *Wood*, (1890) 54 J.P. 742; and the member through whom the stranger pays is guilty of aiding and abetting the unlicensed sale. Ibid; *Owen* v. *Langford*, (1891) 55 J.P. 484.

The disposal by a club steward of liquors belonging to the club will constitute an offence against the Canada Temperance Act, if it be a device to evade the Act. *Ex. p. Coulson* (N.B.) 1 Can. C.C. 31.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE AND TOWNSHEND, JJ., GRAHAM, E.J., AND HENRY, J., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. HARTLEN.

Incapacity for crime—Presumption of—Minor under 14—Unnatural offence—Cr. Code 10, 174, 260, 266 (2).

1. It is to be conclusively presumed that a party is physically incompetent to commit an unnatural offence under Cr. Code, sec. 174, if under the age of fourteen.
2. Such presumption is not affected by the provisions of Cr. Code, sec. 10, and the latter section refers exclusively to mental capacity to distinguish between right and wrong.
3. Although a minor under fourteen cannot be convicted of sodomy, he may if the act be committed against the will of the other party be punished for an assault under Cr. Code, sec. 260.

ARGUED: November 23, 1897.

DECIDED: January 11, 1898.

Defendant was arraigned on a charge of having committed an unnatural offence under sec. 174 of the Code, and pleaded not guilty.

The trial was had on the 14th Oct., 1897, and his mother swore that he was eleven years of age on the 30th April previous. The party on whom the crime was committed was an infant of seven years. The proof showed that the act was fully consummated, and there was evidence of considerable penetration, and with some degree of force.

The judge of the county court convicted the prisoner of the crime, and, at the same time, stated that, in his opinion, he was competent to know the nature and consequences of his conduct, and to appreciate that he was doing wrong, but he postponed sentence until he had submitted to the court of appeal the following questions of law:

First. Is it to be conclusively presumed that a party is physically incompetent to commit this act by reason of his

being under the age of fourteen years, as is the law in the case of rape? (Sec. 266 of the Code.)

Second. Does sec. 10 of the Code apply under the circumstances therein stated, and render the party responsible for the commission of this offence though under fourteen years of age?

Third. If it does, was my conclusion, that the prisoner had a guilty knowledge that he was doing wrong, warranted by the evidence?

If these questions are replied to in the negative, the prisoner will be entitled to be discharged; if in the affirmative, I shall proceed to sentence him.

At the request of Mr. Power, who defended the prisoner, I state an additional question, which, however, was not raised until some time after the trial:

Fourth. Was the prisoner, being of the age he was, capable of electing by what tribunal he would be tried?

By Cr. Code, sec. 266, it is enacted that no one under the age of fourteen can commit the offence of rape.

By Cr. Code, sec. 10, no person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.

J. J. Power, for the prisoner. Sec. 10 of the Code is merely declaratory of the common law. At common law a boy of this age could not be convicted of buggery. The same principle holds good in this case as in the case of rape. (Weatherbe, J.—Rape is distinctly provided for in the code, but this is not.) Taschereau, Criminal Code, p. 171. At common law an infant under fourteen years of age would not be convicted of sodomy. Archbold, Criminal Evidence, p. 777; 1 Hale, Pleas of the Crown, p. 670; *Queen* v. *Allen*, 1 Den. C. C. 364; 1 Russell on Crimes, p. 879.

J. W. Longley, Attorney-General, contra. *Queen* v. *Eldershaw*, 3 C. & P. 396.

HALIFAX, January 11, 1898.

RITCHIE, J.—

The accused, being under fourteen years of age, is, by the common law of England, assumed to be physically incompetent to commit the crime with which he is charged, and I find no provision in the Code altering the common law in this respect.

Sec. 10 of the Code, in my opinion, refers solely to the mental capacity to distinguish between right and wrong, and not to the physical ability to commit crime.

If the offence was committed against the will of the other boy, the accused may be punished for an assault under s. 260 of the Code, but he cannot, in any case, in my opinion, be convicted of the crime of sodomy.

See the case of *Reg.* v. *Brimilow*, 9 C. & P. 366, where the crime of rape was proved, but the prisoner was under fourteen years of age, and it was held that he could not be convicted of rape, but only of an assault.

MCDONALD, C.J., and GRAHAM, E.J., concurred.

WEATHERBE, J.—

I am of opinion that for the crime for which the prisoner was indicted, resort must be had, for the definition of the offence, to the common law. There is nothing in the Code to prevent this. Under the facts of the case, the boy, at common law, would be found to be physically incapable by reason of his age. For this reason, I think the conviction bad.

HENRY, J.—

I am of the opinion that the answer to the first question must be in the affirmative.

In the common law it has been for hundreds of years a conclusive presumption, that a person under the age of fourteen years is incapable of committing the crime of rape. This means that the law absolutely determines that a person under the age of fourteen has not the capacity to ac-

complish the sexual act to the extent to which such act must be performed in order to make the person accused guilty of the crime of rape.

This presumption has no analogy to the conclusive presumption that an infant under the age of seven years is incapable of committing any crime, or to the disputable presumption to the same effect as to an infant under fourteen. The presumption as to rape relates exclusively to physical capacity. The presumption as to criminal capacity in general, in respect of persons under the ages of seven and fourteen years respectively, relates exclusively to mental capacity. This obvious distinction was long ago expressed as follows:

"An infant under the age of fourteen years is presumed by law unable to commit a rape, and, therefore, it seems, cannot be guilty of it, and though in other felonies *malitia supplet ætatem*, in some cases, as hath been shown, yet it seems, as to this fact, the law presumes him impotent as well as wanting discretion." 1 Hale, P.C. 630.

As to whether this presumption is applicable to cases such as the present, there is little, if any, direct authority, but a consideration of the reason of the law shows that it is applicable, for the reason that the degree of carnal knowledge necessary to involve criminal responsibility is the same as in rape. As to this see Archbold, Crim. Pr. 777; 1 Russell on Crimes, 879; *Rex* v. *Reekspear*, 1 Moody 342; *Rex* v. *Cozins*, 6 C. & P., 351.

Having regard to the reason of its existence, it is clear that the common law presumption is, that a person under fourteen is incapable of having carnal knowledge, not merely that such a person is incapable of committing rape. It is because of the presumption, so understood, that a person under fourteen cannot be convicted of rape.

The reports of the case of the *Queen* v. *Allen*, 1 Dennison Cr. Cases, 364, show that the presumption applies to cases of unnatural crime. The court, composed of Lord Denman, Parke, B., Alderson, B., and Coltmand and Coleridge, JJ., dealt with the case upon the hypothesis that a person under

fourteen could not be convicted of the act charged against the prisoner in the present case. Moreover, it is stated generally in Archbold's Criminal Evidence, that the evidence is the same in cases of this kind as in the cases of rape.

But it was contended that because the Criminal Code, in dealing with rape, expressly provides (sec. 266, sub-sec. 2), that no one under the age of fourteen years can commit that offence, and in dealing with unnatural crime is silent as to the matter of age, these two portions of the Code must be construed as amounting to a repeal of the common law, in respect of the age necessary to warrant a conviction for the offence charged here. The argument is that if, in the common law, the presumption as to incapacity was applicable alike to rape, and to this crime, then, since the Code enacts it only as to rape, it must be held that it was intended to repeal it as to the other crime.

The answer to this seems to me to be plain.

The provision of the Code that no one under fourteen can commit rape is a declaration of the common law in respect of that crime. Declaring this presumption in the one case, and neglecting or omitting to declare it in the other, cannot make a person liable to be convicted of a crime which he could not commit before the Code was passed. Previous to the enactment of the code, the crime in question was one which it was impossible for a person under fourteen years to commit. In contemplation of law, the offence charged was impossible to be committed—could have no existence. Or, putting the matter in another way, the result of the presumption was that it was not a crime for a person under fourteen to commit the act in question. How then can a declaration that a person under that age cannot commit rape amount to an enactment that such a person can, nevertheless, commit the other offence?

It was also contended that the Code being silent as to age in cases of this kind, that matter must be governed by sections 9 and 10, which deal with the ages of seven and fourteen years respectively, as already mentioned. As to this, if the contention is not otherwise shown to be fallacious,

it is sufficient to point out once more that the presumptions of the common law, which are set out in these sections of the Code, have reference exclusively to mental and moral as distinguished from physical capacity—to the capacity to know the difference between right and wrong, not to the bodily capacity to do wrong.

For reasons which appear as part of the grounds of my answer to the first question I am of the opinion that the second question should be answered in the negative.

The second answer being answered in the negative, it is unnecessary to answer the third.

Note: *Sodomy—Assault with intent to commit—Legal incapacity of accused under fourteen.*

The case of *R.* v. *Brimilow* (1840) 9 C. & P. 366, 2 Moody C.C., 122, was decided under the statute 1 Vict. (Imp.) c. 85, s. 11, which enacted, "that on the trial of any person for any felony where the crime charged shall include *assault*, the jury may acquit of the felony and find the party guilty of an assault, if the evidence shall warrant such finding."

Brimilow was charged with rape, and on it being proved that he was under fourteen years of age, it was left to the jury to say whether he was guilty of an assault, and on conviction, and a case reserved, it was held that he could, on an indictment for rape, be legally convicted of an assault under that statute.

A boy under fourteen cannot in point of law be guilty of an assault *with intent* to commit a rape *R.* v. *Phillips* (1839) 8 C. & P. 736, nor of carnally knowing and abusing a girl, although proved that he had arrived at puberty, *R.* v. *Jordan* (1839) 9 C. & P. 118, nor of the offence of carnal knowledge of a girl under thirteen *R.* v. *Waite* (1892) 2 Q.B., 600.

Sec. 260 of the Criminal Code is as follows:—

"Everyone is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults

Note—*Continued.*

any person *with intent* to commit sodomy, or who being a male, *indecently assaults* any other male person."

The application of the same rule to cases of sodomy as to cases of rape as shown in the principal case would lead to the conclusion that no one under the age of fourteen can be legally convicted of an assault with intent to commit sodomy.

It may, therefore, be assumed that the dictum in the principal case that the accused might be punished for "an assault under sec. 260" is intended to refer only to the latter part of the section relating to "indecent assaults upon another male person."

[COURT OF QUEEN'S BENCH, QUEBEC.]
CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. ROBIDOUX.

Fine and imprisonment—Discretion to exempt from statutory penalty—Inland Revenue Act—Illicit distilling—Cr. Code 259, 932, 934, 953.

1. Where a statute of Canada imposes a fine and also imprisonment the punishment is in the discretion of the Court, which is not bound to inflict both, but may inflict either one or the other of the two kinds of punishment by virtue of Cr. Code 932.

MONTREAL, November 26, 1898.

WURTELE, J.—

Pierre Robidoux, the defendant, was prosecuted by Gilbert N. Brabant, an officer of Inland Revenue, for having on the 22nd November, 1897, without having a license, assisted in the distilling of spirits in an unlicensed house or place in the City of Montreal, in contravention to paragraph (*b*) of section 159 of the "Inland Revenue Act" (R.S.C., ch. 34), and he was convicted by the Judge of the Sessions of the Peace, Mr. M. C. Desnoyers, on the 24th November, 1897. By an amendment to the above-mentioned section, contained in section 6 of the Statute 60-61 Victoria, ch. 19, it is provided that everyone who is guilty of the offence in question shall be "liable to a penalty not exceeding $500.00, and not less than $100.00, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month." The magistrate adjudged the defendant for his offence to pay a fine of $100.00, but he did not at the same time impose any imprisonment.

The prosecutor has appealed to the Court of Queen's Bench, on the Crown side, against this conviction, and he contends that the magistrate had no discretion under the statute imposing the punishment, and that he should have

condemned the defendant to both the fine and an imprisonment.

In England and in the United States a statute imposing a fine and also an imprisonment is construed in accordance with the prosecutor's contention. Bishop, in his commentaries on the Criminal Law, says, in section No. 941 of the first volume: "If a statute provides a fine *and* imprisonment, both must be inflicted;" and Endlich says, in section 15: "When a statute prescribes as the punishment for an offence a fine *and* imprisonment, the Court is bound to inflict both upon the party convicted."

But in Canada we have special legislation regulating this subject which does not exist in England nor in the United States; and we must be guided by the provision of our own express law, and not by a jurisprudence founded on statutory law which does not contain this special provision, and is therefore different to ours.

I will now refer to the enactments of our law relating to this matter. Section 934 of the Criminal Code provides that the amount of any fine shall, within such limits as may be prescribed, be in the discretion of the Court passing sentence or convicting; and section 953 enacts that anyone liable to imprisonment for life, or for any term of years, may be sentenced for any shorter term not shorter than the minimum term which may be prescribed for the offence of which he is convicted. This is also the rule in England and in the United States. Then section 932 of the Criminal Code declares that, when it is provided that an offender shall be liable to different kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the Court before which the conviction takes place. This provision was first enacted in 1869 by section 1 of the Statute 32-33 Victoria, ch. 29, and no similar enactment is to be found in the English or in the American statutes. Under this provision of our law, where, as in the present case, a statute prescribes as the punishment for an offence both fine and imprisonment, the Court which convicts has the right in its discretion to impose either a fine

alone, or an imprisonment alone, or both, unless the statute declares a contrary intention and expressly overrides the general rule contained in section 932 of the Criminal Code, which the statute in the present case does not do. If this provision did not exist, our Courts would have to decide, as in England and in the United States, that both punishments would have to be inflicted when they are connected with the word "and," and that it is only when the disjunctive "or" is used that one of them alone can be imposed. But in inflicting only one of the two kinds of punishments, the Court must of course keep within such maximum and minimum as may be prescribed.

The Court of Queen's Bench, on the Crown side, frequently uses this discretion in cases where whipping may be inflicted. For instance, under section 259 of the Criminal Code, everyone found guilty of an indecent assault on a female is liable to two years' imprisonment *and* to be whipped; and still the Court in many cases, acting under the discretion conferred by the special proviso contained in section 932 of the Criminal Code, does not inflict the whipping, and imposes only an imprisonment.

I am of opinion that in the present case it was within the discretion of the convicting magistrate to impose only a fine on the defendant, and to exempt him from the imprisonment, and that the appeal is therefore unfounded.

The appeal is dismissed with costs.

Gouin, Lemieux & Decarie, for the prosecutor.
Dupuis & Lussier, for the defendant.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE AND TOWNSHEND, JJ., GRAHAM, E.J., AND HENRY, J., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. TROOP.

Evidence—Former Deposition—Contradiction of Testimony by —Materiality—'Res Gestæ'—Assault with Bodily Harm—Oral Evidence where Depositions Lost—Cr. Code, 262, 700, 701.

1. The oral statement of a witness on his examination before a magistrate, reduced to writing by the magistrate, must be proved by the writing if it can be produced, but if the depositions have been lost or stolen, and no copy of them is under the control of the party adducing the evidence, it is then not necessary to prove the contents of the writtten record of the evidence; and the statement of a witness who was present at the examination will be admissible.
2. In a prosecution for an assault occasioning actual bodily harm (Cr. Code, 262) it is improper to exclude evidence of statements sworn to by a witness for the prosecution at a preliminary enquiry, the record of the depositions upon which had been lost, as to what was said by the accused at the time of the assault, as such statements of the witness had reference to statements of the accused forming a part of the *res gestæ*.
3. A witness who has been cross-examined as to an alleged previous statement made by her under oath, in judicial proceedings relative to the subject matter of the case, and who after mention to her of the circumstances designating the particular occasion, has denied that she made the alleged statement, may in case of the loss of the depositions containing the record of what was then sworn to, be contradicted by oral testimony regarding the disputed statement.

ARGUED: November 9, 1897.
DECIDED: January 11, 1898.

This cause was tried before Mr. Justice Meagher at Clare upon an indictment under sec. 262 of the Criminal Code, charging the accused with an assault upon one Annie Sullivan, occasioning her actual bodily harm.

The defendant was convicted and sentenced, but the execution of the sentence was respited, pending final judgment upon the present reserved case, and defendant admitted to bail.

The alleged assault took place in the house occupied by the accused in Digby town.

The prosecutrix, who was the mother of the witness, Edna W. Troop, the wife of the accused, hereinafter referred to, and a Mrs. Langstaff with whom they boarded, at the request of Edna W. Troop, accompanied her to the house of the accused. The accused and wife were at that time living apart from each other and had been for some time.

The accused did not deny in his testimony that he removed the prosecutrix by force from his premises upon the occasion in question; but he testified that upon her refusal, after request on his part, to leave his house, he used sufficient force to put her out of the house, and no more; and that he could not have got her out otherwise than by using the force he did.

The only question necessary to be submitted to the jury was whether the accused used more force than was reasonably necessary under the circumstances to effect her removal from his premises. Upon that question there was a conflict of testimony, but the preponderance was against the accused.

The evidence of said Edna W. Troop was material in favor of the prosecution as to the nature, circumstances and extent of the assault. The prosecutrix and the lady who accompanied Mrs. Troop and herself to the accused's house were also examined on behalf of the prosecution.

Edna W. Troop was examined as a witness upon the preliminary enquiry before the committing magistrate.

The depositions taken by him thereon, including that of Edna W. Troop, were admitted to have been stolen from the Prothonotary's office and were lost.

The witness, Edna W. Troop, during her cross-examination upon the trial of the indictment, amongst other things, said:—

"I gave evidence upon the preliminary enquiry. I don't think I said on that occasion:—'Mr. Troop said, 'You all get out of my house,' and I said, 'Do you mean me to get out,' and he replied, 'You can stay, but they have got to get out.'"

"That is the best I can say. I didn't say that I had made no attempts to see the accused before going to his house that evening. I think I said I was not aware there was any bad feeling between my mother and the accused. . . . I don't think accused said that evening that I could stay. I didn't say below he said that."

When the accused was called as a witness on his own behalf, his counsel, after proving by him that he heard the witness, Edna W. Troop, give her testimony upon the preliminary enquiry, proposed to examine him, with the view of showing, by way of contradiction, that while under examination before the committing justice, she made statements at variance with the testimony she gave upon the trial of the indictment, and which last mentioned testimony, so far as material to the present reserved case, is embodied in the foregoing extract from her evidence. Mr. Pelton, Q.C., of counsel for the Crown, objected to the reception of the proposed evidence, and, after hearing argument thereon, the learned judge rejected the evidence sought to be given.

The question for the consideration and determination of the court was whether or not the ruling was correct under the circumstances.

The Criminal Code, 1892, provides :—

700. Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him ; but if it is intended to contradict the witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him ; and the judge, at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit : Provided that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness.

701. If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

W. E. Roscoe, Q.C., for the prisoner. The only question is as to the construction of sec. 700 of the Code. It was error to hold that it was necessary that the writing should be produced in court. Taylor on Evidence, sec. 1449. These rules were abrogated by statute now incorporated in the Code. We could get in this evidence independently of sec. 700. Taylor on Evidence, sec. 400; *Regina* v. *Curtis*, 2 Car. & Ker. 763; Note to 2 Moo. & Rob. 388; *Doe d. Wildgoose* v. *Pearce*, 5 M. & W., 509. The deposition while it is in existence might be considered primary evidence, but not so where it is not in existence. Taylor on Evidence, sec. 399, 552 and 1447. The only question is as to the manner of the contradiction. Where you do not wish to contradict by the writing, but by something else, the section does not apply. If the statements were taken down, then we were giving evidence of what was said in the depositions. If they were not taken down then we were not giving secondary evidence of the depositions. (HENRY, J.—How can a witness give secondary evidence of a document he never saw?) There is a presumtion that what was said was taken down, and when we prove what was said we prove the contents of the deposition. Archibald's Crim. Prac. (19th Ed.) p. 310; *Queen* v. *Gibson*, 18 Q. B. D., 537; Crankshaw Crim. Code, p. 643.

J. W. Longley, Attorney-General, contra.—The defence did not put themselves in a position to give secondary evidence of the depositions. The proposed evidence is not material, and was only given to discredit witness, and her

answer is conclusive. *Regina* v. *Riley*, 4 F. & F. 964; *Creelman* v. *Tupper*, 25 N. S. R. 334; *Commonwealth* v. *Silk*, 3 Mass. 431; 2 Fisher's Dig. 2351 and 2352. The depositions being lost, defendants could only give evidence of what was in the depositions.

W. E. Roscoe, Q.C., in reply.—The evidence was a part of the *res gestæ*.

HALIFAX, Jan. 11th, 1898.

HENRY, J.—

The question of law which is raised by this case may be stated as follows :—

"Where upon the trial of an indictable offence, it is sought, under article 700 of the Code, to contradict a witness, by his deposition taken before a justice at a preliminary enquiry, and it is proved that the deposition is lost, is it competent to prove what the witness said by the testimony of a person who was present at the examination and heard the evidence given?"

The alternative position is that the only legal evidence which can be given is secondary evidence of the contents of the written examination. Since the written examination being taken in accordance with the provisions of a statute, is, so long as it is available, the only legal evidence of its subject matter, it would seem at first sight, or perhaps I should say, it seemed to me, at first sight, that the only receivable substitutionary proof would be testimony as to its contents. Closer consideration, however, has led me to a different result, and one which seems to me to be not only sound in principle but preferable from the practical standpoint.

Some confusion has arisen from inadequate discrimination as to the meaning of the terms "primary evidence," and "secondary evidence." A deed of land is a conspicuous instance of a document, which, if possible, must be produced as being the primary and best evidence of its exist-

ence and its contents. It is at the same time the direct and most convincing proof of its own being, and the most satisfactory evidence of its contents. When it is lost there is nothing behind it to resort to, so that, in its absence, only secondary evidence of what it contained can be given.

But an oral examination of a witness reduced to writing in compliance with a statute, is not original or primary, so that it can be said there is nothing behind it. In the case of such a writing, the original and primary thing—the thing to be proved—is what the witness said. The legal position, that while it exists and is accessible, the written examination is the only admissible proof of its subject matter does not necessarily involve the result that when it is lost you may give secondary evidence of what it contained, but may not give direct evidence of what was said by the witness whose oral evidence it purported to record.

So far as I have been able to ascertain, there is not upon this question any direct decision. There is in Taylor on Evidence, a passage which has run through all the editions of that work, American as well as English, without being fortified by any more authority than there was to support it when first published. I entertain no doubt as to the correctness of the text as a statement of the law, but I am bound to say that the references given to justify it do not afford it any direct support.

In discussing the rule that the law recognizes no degrees in the various kinds of secondary evidence, the learned author, (sec. 552), says :—

" In considering the practical effect of this rule care must be taken to exclude from its operation those cases in which the law has expressly substituted in the place of primary proof some particular species of secondary evidence. Thus, for instance, where the contents of public records and documents are to be proved, examined copies, and, in some cases, office or certified copies, are, on grounds of general convenience, considered admissible ; and such copies, though in strictness secondary evidence, partake so much of the character of primary proof, that, so long as it is possible to

produce them, other inferior degrees of secondary evidence cannot be received. Parol testimony, therefore, can only be admitted on proof, first, that the public record or document has itself been lost or destroyed, for otherwise a copy might be obtained; and, secondly, that such copy, if any has been taken, is no longer under the control of the party relying upon less satisfactory evidence. In like manner if a witness has been examined before a magistrate or coroner, under such circumstances that these officers respectively have in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death so long as the deposition itself can be produced; for the law having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. If, indeed, it can be shown that the deposition is lost or destroyed, or is in the possession of the opposite party, who, after notice, refuses to produce it, the statement of a witness who was present at the examination will then be admissible, as well as a copy of the deposition."

As already mentioned the references which are found in the note to this text do not directly support it, but the learned note of Mr. Greaves, at page 895 of the second volume of Russell on Crimes, which is cited by Taylor, gives light upon the point in question.

There is another passage in Taylor, (sec. 548), which incidentally expresses the view that depositions such as we are discussing are themselves, not in the strict sense of the term primary, but secondary evidence. It is as follows :—

"When depositions are tendered in evidence as secondary proof of oral testimony, they are of course, open to all the objections which might have been raised, had the witness himself been personally present at the trial."

I am of the opinion that the correct solution of the question is simply as follows :—

The law (article 700 of the Code being a re-enactment of sec. 235, Rev. Stat. Canada, c. 174, originally taken from sec. 5, Imperial Statute, 28 and 29 Vic. c. 18), provides for cross-

examining a witness as to previous statements made by him in writing, or reduced to writing, and for contradicting him if necessary by such writing. As to a statement made orally by such a witness and reduced to writing, as in the present case, his statement, if the writing can be produced, must be proved by the writing; but failing the writing, the provision of the law can be carried out by proving the statement in the way which would be the obvious and the legal method if the reduction to writing had never taken place, namely, by the evidence of a witness or witnesses, who heard the statement as it was originally made.

This view is, of course, not applicable to the case of a statement made in writing by the witness himself, which, obviously could be proved only by the production of the writing itself, or failing that, by proof of its contents.

It was said at the argument that the evidence excluded was not "relative to the subject matter of the case." The evidence excluded was as to alleged statements of one of the witnesses for the prosecution at the preliminary examination, as to what was said by the accused at the time of the alleged assault, and as to which alleged statements the witness had been cross-examined.

As to this, it seems to me enough to say, that these alleged statements of the witness had reference to alleged statements of the accused, constituting, a part of the *res gestæ*, that is to say, a part of the transaction which was the subject of the trial. This being so, we may not concern ourselves with an enquiry as to the measure of its importance.

I am of the opinion that the ruling of the learned judge, in refusing to receive the evidence in question, was erroneous and that there should be a new trial.

GRAHAM, E. J., concurred.

RITCHIE, J.—

In the cross-examination of one of the Crown witnesses, she was asked by the prisoner's counsel if she made certain statements when she gave evidence on the preliminary enquiry.

She denied having done so, and the prisoner's counsel subsequently wished to prove by a witness who heard her testimony on the preliminary examination, that he had heard her make such statements. It was admitted that the depositions had been lost.

By the regulations established for the cross-examination of Crown witnesses by the English judges in 1837, and which may be found in C. & P. 676, the witness could not be cross-examined as to any statement made on his preliminary examination until his deposition had been read. Then, if the statement did not appear in the deposition, he could be cross-examined about it, and if he denied making it, and it was material to the matter in issue, the prisoner could call witnesses to prove that such statement was made. Now, under sec. 700 of the Criminal Code, the witness can be cross-examined as to statements made by him at the preliminary enquiry, without producing his deposition, and it seems clear that the deposition was not to be taken as the sole evidence of the statements made at the preliminary enquiry.

In the case before us the prisoner's counsel, as I understand it, did not intend to contradict the witness by the writing, and it is not within the provisions of sec. 700 at all, but under the sec. following (701). The witness Edna W. Troop, having been cross-examined as to a previous statement relative to the subject matter of the case, and having denied that she made it, proof can be given that she did indeed make it, the particular occasion having been designated; and I am of the opinion that there is nothing to prevent such evidence being given by witnesses who were present and heard the statement made.

As regards the materiality of the evidence proposed to be contradicted, I have little doubt. The indictment was for an assault, and the statement proposed to be given in evidence, as I understand it, was one made by the witness as to what she and the accused said, at the time the assault was alleged to have been committed. This, I think, was material to the matter in issue, and part of the *res gestæ*, and could be contradicted under the statute.

I think the learned trial judge was wrong in refusing to receive the evidence, and there must be a new trial.

McDONALD, C.J., concurred.

TOWNSHEND, J.—

I am of opinion that the evidence rejected on the trial of this indictment should have been received. The evidence was offered to contradict certain statements alleged to have been made by Edna W. Troop, on the preliminary investigation before the magistrate. The statute requires the magistrate to take down in writing, to be signed by the witness, the evidence given at that time. By sec. 700 of the Code the witness may be cross-examined as to any such statements without the writing being shown, but if it is intended to contradict the witness by the writing, his attention must, before such contradicting proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. In this case it is proved by admission that the depositions were lost, and, therefore, the statute in this respect could not be complied with. It is clear from the reserved case that the subject of contradiction referred to what was stated at the preliminary enquiry, which it is to be presumed was taken down by the magistrate. Assuming, as we must, for the purpose of this argument, the evidence to be most material, and cogent against the prisoner, if true, does his inability to comply with its requirements, through no fault of his, shut him out from disproving by contradictory evidence the truth of what has been stated against him? This is the position taken by the Crown, and seems to me most unreasonable, and contrary to sound principles.

In Taylor on Evidence, sec. 1447, after referring to the provision already cited, (sec. 700), he says :—

"If it should appear from cross-examination of the witness, or from any antecedent evidence, that the writing in question has been lost or destroyed, the proviso first cited empowering the judge to require its production will of course, become inoperative. In such a case therefore it is apprehended that the witness, might be cross-examined as

to the contents of the paper, notwithstanding its non-production, and that if it were material to the issue he might be afterwards contradicted by secondary evidence."

Again, at sec 552, after discussing when secondary evidence may be received, he says :—

"Parol testimony, therefore, can only be admitted on proof first, that the public record or document has itself been lost or destroyed, for otherwise a copy might be obtained, and secondly, that such copy, if any had been taken, is no longer under the control of the party relying upon less satisfactory evidence. In like manner, if a witness has been examined before a magistrate, or a coroner, under such circumstances, that these officers respectively have in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given, in the event of his death, so long as the deposition itself can be produced; for the law having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. If indeed it can be shown that the deposition is lost or destroyed, or in the possession of the opposite party, who, after notice, refuses to produce it, the statement of a witness who was present at the examination will then be admissible, as well as a copy of the deposition."

These propositions seem to me conclusive as to the right of the prisoner, first, to cross-examine the witness as to what she did say on the preliminary examination before the magistrate, and then to contradict her by witnesses who were present and heard what she did say, it being first proved, as here, that the original depositions were lost.

The only remaining enquiry is as to its materiality. That it was material is plain, because it related to what was said at the time of the assault. There can be no doubt that everything said or done by the parties at the time of the occurrence then being investigated, is relevant and material. It is not necessary to refer to authority for such a simple proposition.

I, therefore, am of the opinion that this conviction should be quashed, and a new trial granted.

Note :—'*Res gestæ*'—*Admissibility of declaration as part of.*

The expression '*res gestæ*' includes everything which may be fairly considered an "incident of the event under consideration." Taylor on Evidence, 1897, sec. 583.

The circumstances or declarations need not be contemporaneous with the main fact under consideration if so connected therewith as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction. *Rouch* v. *Great Western Ry.* (1841) 1 Q.B., 51, 61 ; *Bateman* v. *Bailey*, 5 T. R. 512 ; *Ridley* v. *Gyde*, 9 Bing. 349 ; *Rawson* v. *Haigh* (1824) 2 Bing. 104. Taylor on Evidence, 1897, sec. 588.

" Although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential." Per Lord Denman, C.J., in *Rouch* v. *Great Western Ry.*, *supra.*

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE MEAGHER, J., IN CHAMBERS.

THE QUEEN v. CROWELL.

Conviction—Imposition of fine—Forfeiture must be adjudged—Direction for payment insufficient.

1. A summary conviction by a Justice of the Peace, whereby a fine is sought to be imposed, must adjudge forfeiture of the amount as well as payment thereof.
2. The prisoner is entitled to be discharged under habeas corpus if the conviction merely adjudges that he "forthwith pay" a sum named, and in default of payment be imprisoned.

Motion for discharge under habeas corpus.

The defendant was convicted by a magistrate for a violation of the Inland Revenue Act of Canada (R.S.C. 1886, c. 34), and adjudged "to forthwith *pay* $100, and in default of payment to be imprisoned for six months." The return to the habeas corpus was of a warrant reciting such conviction.

F. T. Congdon, for the prisoner.
F. A. Mathers and *J. A. MacKinnon*, for the informant.

HALIFAX, December 13, 1897.

MEAGHER, J.—

This is a motion to discharge the defendant from custody, where he is confined on a warrant for an offence against the provisions of the Inland Revenue Act.

Two objections were urged: *First*, that two offences were adjudged in the conviction, viz.: (1) assisting in distilling, and (2) assisting in rectifying spirits; *Second*, that there was no adjudication of forfeiture of the penalty imposed.

The latter ground must prevail, and the defendant will therefore be discharged; but there must be an undertaking not to bring an action against the justice or the officers concerned in the execution of the warrant, including the gaoler.

[QUEBEC SUPERIOR COURT FOR THE DISTRICT OF OTTAWA.]

BEFORE ARCHIBALD, J.

Ex Parte WELSH.

Warrant of commitment for trial—Invalidity—Wrong description of magistrate's official designation—Description of offence—Verbal threats to burn buildings not an indictable offence—Discharge on habeas corpus—Cr. Code 233, 485, 486, 487, 959 (2).

1. A justice's warrant of commitment for trial must describe an offence for which a commitment for trial can be legally made.
2. Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace.
3. A warrant of commitment signed by magistrates as "Justices of the Peace in and for the County of Labelle," no justices being appointed with such designation and no such title existing at law, is illegal, and, when no application is made for its amendment, should be quashed, and the prisoner discharged upon habeas corpus.
4. Justices presuming to act as such in and for a county named will not be presumed to have acted as justices for the district in which the county is situate, and for which district they have been appointed.

HULL, QUE., September 29, 1898.

ARCHIBALD, J.—

The prisoner, Dame Mary Welsh, was committed to the Common Gaol for the District of Ottawa, on a warrant in the form following:

CANADA,
Province of Quebec,
County of Labelle.

To the Constable of Thurso and the Keeper of the Common Gaol of Hull, in the said County of Labelle.

Whereas Mary Welsh, wife of Michael McMarrow, was charged before us, William Thompson and C. W. Pearson, two of Her Majesty's Justices of the Peace, in and for the said County of Labelle, on the oath of Michael McMarrow, farmer, and others, for that Mary Welsh, wife of Michae

McMarrow, did, on the seventh or eighth day of September, 1898, at my farm, threaten to burn my buildings and haystack, and to take my life; the haystack and shanty has since been burnt, and I am afraid of her, and we deem evidence sufficient to commit the prisoner to her trial at the next sitting of the Criminal Court to be held at Hull.

These are therefore to command you, the said constable, to take the said Mary Welsh and her safely to convey to the Common Gaol at Hull aforesaid, and there to deliver her to the Keeper together with the precept, and hereby command you, the said Keeper of the Common Gaol, to receive the said Mary Welsh into your custody, in the said Common Gaol, and there safely keep her until she shall thence be delivered by due course of law.

Given under my hand and seal this 19th day of September, 1898, at Thurso, in the said County of Labelle.

(Signed) WM. THOMPSON, J.P.
" C. W. PEARSON, J.P.

Upon the issue of the writ of habeas corpus, the gaoler returned the body of the said Mary Welsh and the foregoing commitment as the sole cause of detention. I thereupon ordered the issue of a writ of certiorari addressed to the committing magistrates for the purpose of bringing before me the record of their proceedings in this cause. This having been done, I find that the information really charged the prisoner with having burned the stack and buildings in question. And I am bound to say that, after consulting the evidence adduced, I think the magistrates would have been justified in committing the prisoner for trial for that offence.

However, as the magistrates have not appeared or sought to amend the commitment, I must enquire only as to whether the cause of detention returned by the gaoler is sufficient to justify the retention of the prisoner in custody.

The petitioner raises various points which may be summarized as follows:

1. The commitment does not disclose any offence at law for which she could be committed for trial.

2. The magistrates who have signed the commitment act as magistrates "in and for the County of Labelle," whereas no such title exists at law.

3. The commitment is vague and is insufficient, and does not show the territorial jurisdiction of the magistrates to act.

I may just remark in reference to this last ground that the commitment is undoubtedly very vague, and does not clearly show whose stack and buildings the prisoner threatened to burn, or whether such threats were made or such buildings situated at any place where said magistrates had jurisdiction. Yet I would hesitate to quash a commitment on that ground, as I think there is a presumption in favour of the legality of the action of the justices. And want of jurisdiction ought to be shown by the prisoner.

The most important reason given by the prisoner is that the commitment does not describe any offence for which she could be committed for trial. All that appears by the commitment is that on a given date the prisoner verbally threatened to burn the complainant's stack and buildings, and that complainant was afraid of his life of her."

Now this is evidently the case referred to in section 959, s.s. 2 of the Criminal Code, which is as follows :

"959(2). Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months."

By Art. 233 of the Criminal Code, it is made an offence punishable by ten years' imprisonment to send a letter threatening assassination. Art. 485 provides punishment for attempts to set fire, etc., and 486 provides that under certain conditions negligence by which fire is actually set shall be an offence.

Art. 487 is as follows :

"487. Everyone is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain, hay or straw or other agricultural produce, or any grain, hay or straw or other agricultural produce in or under any building, or any ship or vessel."

These are all the provisions of the Criminal Code which refer to the matter in hand. It is seen, then, that threats are not the subject of indictment unless they are in writing, and that verbal threats, such as the prisoner is alleged to have made, only give rise to proceedings to force the offender to give security to keep the peace.

I must hold, then, that the commitment does not show any offence at law which could justify the prisoner's detention.

As to the second point, I must remark that a very similar case, *Dagenais* v. *Ellis* (3 Revue de Jurisprudence, p. 365), arose in the District of Beauharnois. In that case the prisoner was arrested on a charge of larceny upon a warrant signed by the magistrate as Justice of the Peace in and for the County of Beauharnois. The prisoner obtained the issue of a writ of prohibition ordering the magistrate to refrain from continuing the proceedings, alleging the defect above set forth. The judge in the Superior Court maintained the writ and quashed the proceedings. This judgment was reversed in review, but restored in appeal. I would, therefore, be obliged to hold that a commitment signed by magistrates in and for the County of Labelle is illegal, and insufficient to justify the continued detention of the prisoner.

I therefore quash the commitment, and order the gaoler of the District of Ottawa at Hull to discharge the said Mary Welsh from his custody.

Order for discharge.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DAVIE, C.J.

Re RUTHVEN.

Perjury—Prosecution for directed by Court—Committal or Bail—Perjury Act R.S.C. 1886, c. 154, s. 4.

1. A committal of a witness under R.S.C. 1886, c. 154, s. 4, pursuant to the judge's direction that he be held and prosecuted for perjury does not prevent the same judge from making an order for bail under that Act, and the judge is not *junctus officio* by reason of the first order.

Application in Chambers for the admission to bail of Victor M. Ruthven, who had been ordered into custody by a bench warrant for perjury committed in the trial of a County Court action being tried before the learned Chief Justice sitting as a County Court Judge.

Section 4 of the Act respecting perjury, R.S.C. 1886, c. 154, s. 4, provides as follows:

"4. Any judge of any Court of record, etc., may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, etc., or other proceeding made or taken before him, direct such person to be prosecuted for such perjury if there appears to such Judge or Commissioner a reasonable cause for such prosecution, and may commit such person so directed to be prosecuted until the next term, sittings or session of any Court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the Court without leave, and may require any person such Judge or Commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid."

Archer Martin, for prisoner: The Court having committed the prisoner is not *functus officio*, and has not exhausted the alternative of section 4 of Cap. 154. The Court will exercise its discretion in all cases to bail a prisoner, Tomlin's Law Dicty. Tit. Bail; Arch. Cr. Pac., p. 330. Mellor's Crown Practice, p. 373. When a man is in custody on a warrant of commitment, he has a right to apply for bail: *Reg.* v. *Mason*, 5 Ont. Pr. 125. The Court is bound to admit to bail: *Re Frost*, 4 Times L.R. 757.

A. G. Smith, Dep. A.-G., contra: Section 533 (*b*) of the Criminal Code 1892 authorizes the Superior Court to make rules regarding bail, and these rules have been made by this Court, importing the English Rules which have no provisions as to bail in a case like this. In Ontario the Province has its own Habeas Corpus Act: *Reg.* v. *Cox*, 16 Ont. R. 228, 230.

DAVIE, C.J.—

In this case, acting under R.S.C. Cap. 154, I directed the prisoner to be prosecuted for perjury, and committed him until the next Assizes. The Act provides that the Judge may commit, or may permit the person directed to be prosecuted to enter into a recognizance, etc., to appear and take his trial, etc. It is suggested that having already committed the prisoner my powers relating to him are at an end; that I must either commit or else admit to bail, but cannot exercise the latter after having invoked the former.

I think, however, construing the section as I am bound to do in favour of liberty, it must be read as authorizing the exercising of both powers. Particularly do I think that this construction must be the right one, as otherwise, apparently, there would be no power to bail.

I therefore direct the said V. M. Ruthven to be prosecuted, etc., and I permit him to enter into recognizances with two or more sureties, himself in $1,000.00 and sureties in same amount conditioned for his appearance at the next Assizes. The form of the recognizance to be submitted to me and the sureties to be to the satisfaction of the Superintendent of Police.

Bail allowed.

Note: *Bail—Nature of—Admitting Prisoner to Bail—Revocation of prior Order.*

Bail is a delivery or bailment of a person to his sureties upon their joining, together with himself, in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail. Blackstone's Com. IV. 296. He that is bailed is in supposition of law, still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in at any time. 2 Hawkins' Pleas of the Crown 124.

"If a person be bailed by insufficient sureties he may be required either by him who took the bail, or by any one who hath power to bail him, to find better sureties, and on his refusal to do so may be committed; for insufficient sureties are as none." Bacon's Abridgment, title, Bail in Criminal Cases, (f.)

Where a prisoner charged with felony had been admitted to bail upon an order of a judge in chambers, the judge has power on an application subsequently made on behalf of the private prosecutor and with the assent of the Attorney-General, to rescind the order for bail and to re-commit the accused, if it be shown that the bail put in was fictitious. *R.* v. *Mason* (1869) 5 Ont. Pr. 125 (Morrison, J.)

The bail may be assumed to be fictitious if it be shown that diligent enquiry has been made in the municipality as residents of which they are described in the recognizance, that no information whatever could be obtained as to their identity, and that on a careful search of the municipal assessment roll the names of such persons were not found therein. Ibid.

When the prisoner, with the depositions and the magistrate's warrant of commitment are duly returned under a writ of habeas corpus, the court is to consider whether it will discharge, bail, or remand the prisoner; and may bail him *de die in diem* pending the consideration of such application, or may direct him to be detained in custody until a decision is

Note—*Continued.*

given. 3 Chitty's Cr. Law 128; *R.* v. *Cox* (1888) 16 Ont. R. 228, 231.

But a writ of habeas corpus for the purpose of admitting the accused to bail should not be granted when the accused is in custody for an alleged criminal offence of a serious character, pending the preliminary investigation before a magistrate, and during the term of a remand granted before any depositions were taken, for the purpose of enabling the prosecution to supply evidence in support of the charge, for without the depositions the court cannot properly determine the amount of the bail. *R.* v. *Cox* (1888) 16 Ont. Pr. 228 (MacMahon, J.)

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE DUBUC, KILLAM AND BAIN, JJ.

THE QUEEN v. CLOUTIER.

False pretences—Arrest on telegram—Legality of—Cr. Code 22, 552 (2), 552 (7a).

1. The arrest of a person, charged with obtaining goods by false pretences with intent to defraud, on a request by telegram from another province of Canada, where the offence is alleged to have been committed, may be justified by a peace officer by alleging either that the prisoner has actually committed such offence or that such officer, on reasonable and probable grounds, believes that the prisoner has committed the offence charged.
2. Cr. Code sec. 22 operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful; and it applies, not only when the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest.
3. Cr. Code sec. 552 (7 a) applies only to cases coming within sub-section 7, and it is not necessary in other cases to bring the person arrested before a justice of the peace before noon of the day following the arrest.

ARGUED: 11th May, 1898.

DECIDED: 11th May, 1898.

Application for discharge of a prisoner under a writ of habeas corpus.

The prisoner had been arrested by the Chief of Police of Winnipeg on a telegram, of which the following was a copy:—

MONTREAL, 10th May, 1898.

J. C. MCRAE, Chief of Police, Winnipeg.

Please arrest Ferdinand Cloutier. Warrant against him for false pretences. Officer will be sent for him on receipt of telegram from you if arrested.

A. BISSONETTE, Chief Constable.

The prisoner applied for and obtained a writ of habeas corpus.

The return of the Chief of Police to the writ was as follows:—

1. I am a police officer of the City of Winnipeg in the Province of Manitoba and a peace officer, and I was such before and on and continuously since the 10th of May, 1898. Ferdinand Cloutier within named, whose body is returned herewith, on or about 20th February, 1898, at the City of Montreal, in the Province of Quebec, in the Dominion of Canada, with intent to defraud by false pretence, directly obtained from Doull & Gibson, of Montreal, aforesaid, goods capable of being stolen of the value of $1,387 or thereabouts, knowledge whereof coming to my notice I did, on Tuesday, 10th May, 1898, as such peace officer at and in the City of Winnipeg aforesaid, arrest and now detain the said Ferdinand Cloutier without a warrant pursuant to the statute in that behalf made and provided.

2. I am a police officer of the City of Winnipeg in the Province of Manitoba and a peace officer, and I was such before, on and continuously since 10th May, 1898. On 10th May, 1898, I received the following telegram from A. Bissonette, Chief Constable at Montreal (set forth above). On the same day I received the following additional telegram from the said Bissonette :—

MONTREAL, May 10th, 1898.

J. C. MCRAE, Chief of Police, Winnipeg.

Hold Ferdinand Cloutier. Detective Killert leaves with warrant. He will be with you Friday.

A. BISSONETTE.

On said 10th May, on reasonable and probable grounds I believed and on such grounds I still believe that an offence for which the offender could be arrested without a warrant had been committed, which offence I believe to have been that Ferdinand Cloutier within named, whose body is returned herewith, on or about 20th February, 1898, at the City of Montreal, in the Province of Quebec, in the Dominion of Canada, with intent to defraud by false pretence, directly obtained from Doull & Gibson, of Montreal aforesaid, goods capable of being stolen of the value of $1,387 or thereabouts, and I, at the time of the arrest of said Ferdinand Cloutier

hereinafter mentioned, believed that Ferdinand Cloutier within named had committed that offence, wherefore I did, on Tuesday, 10th May, 1898, as such peace officer at and in the City of Winnipeg, arrest and now detain the said Ferdinand Cloutier without a warrant pursuant to the statute in that behalf.

H. M. Howell, Q.C., for the prisoner, after the return had been read, moved for the discharge of the prisoner. The return shows no ground for detaining the prisoner. Apart from the Code the arrest would be illegal. Russell on Crimes, vol. 1, p. 721. Authority to arrest without a warrant was for felony only, not for a misdemeanour: *Beckwith* v. *Philby*, 6 B. & C. 635; *Codd* v. *Cabe*, 1 Ex. D. 352; Roscoe's Crim. Evid., 11th ed. 244. Section 22 of The Criminal Code, 1892, merely justifies an arrest, so as to give a protection to a peace officer in a civil action. As to authority to a private individual to arrest, before the Code: Lewis' Manual, 112, 117. The Code does not change the law. The Chief of Police can arrest without a warrant only such persons as a private individual can arrest without a warrant. Section 22 was only intended to set forth the law before the Code. A person must have reasonable and probable grounds for believing a party guilty. The intention was to protect peace officers from civil remedies. It included only cases in which any person could arrest without a warrant. The police were protected only to the extent to which they had power to arrest: Amer. & Eng. Ency. of Law, vol. 2, p. 870. The police of Winnipeg have no power to arrest for an offence committed in Montreal or abroad. An officer must have a warrant properly backed: Lewis' Manual, 116; *Reg.* v. *McHolme*, 8 Ont. Pr. 452. The police cannot hold the prisoner longer, without an information and warrant, even if the arrest was justified. They must have evidence of the commission of a crime.

J. Stewart Tupper, Q.C., and *F. H. Phippen* for the Chief of Police. It has long been the practice in Canada for a peace officer to arrest on a telegram stating that a warrant

has issued, but the legality of this procedure, although frequently questioned, has never before been tested in the Courts. The legality of such an arrest for any of the offences specified in sub-section 2 of section 552 of The Criminal Code, 1892, as amended by chapter 40 of 58 & 59 Vic., is now quite clear. The amended section provides that "A peace officer may arrest without warrant anyone who has committed or is found committing any of the offences mentioned," etc. The return shows that the Chief of Police, believed that the prisoner had committed the offence of "obtaining by false pretence," which is one of the offences mentioned in the above section. This return must be taken as true: Short & Mellor's Crown Office Practice, 357; Paley on Convictions, 314. If the prisoner wishes to dispute the truth of the return he must obtain leave to traverse: 31 Car. 2, c. 2. Authority to arrest involves the right to detain for such time as may be reasonably necessary to allow the process of the law to be enforced. There was no jurisdiction to lay an information in Manitoba, as the only place the charge can be tried is Montreal where the offence was committed. The question whether the prisoner has been detained for more than a reasonable time does not arise here, as the writ of habeas corpus was applied for and granted within such a short time after the arrest. The contention that the prisoner must in any event be discharged because he was not brought before a Justice of the Peace before noon on the day following his arrest is untenable, as sub-clause (a) to sub-section 7 of section 552 only refers to the offences mentioned in sub-section 7.

WINNIPEG, May 11, 1898.

The judgment of the Court was delivered by

KILLAM, J.—

There is a double return to the writ of habeas corpus. Each clause shows that the party to whom the writ is directed is a police constable of the City of Winnipeg and a peace

officer. The first clause shows that the prisoner has in fact committed, at Montreal, in the Province of Quebec, the offence of obtaining by false pretences, with intent to defraud, goods capable of being stolen. The second shows that the prisoner was charged with committing that offence and that the officer believed on reasonable and probable grounds that the offence had been committed by the prisoner, and so believing, arrested, and was detaining him without warrant.

By section 552 of the Criminal Code, anyone found committing certain offences may be arrested without warrant, by anyone. By sub-section 2, as amended by 58 and 59 Vic., c. 40, "A peace officer may arrest, without warrant, anyone who has committed or is found committing" any of the previously named offences or any of certain other specified offences, among which is that with which the prisoner is charged.

As the return shows that the prisoner did in fact commit one of these last specified offences, the officer had authority to arrest him without a warrant. It is true that the offence was committed in the Province of Quebec, but the criminal law is enacted for the whole of Canada, though it has, in general, to be enforced by provincial courts and provincial officers. In my opinion, a peace officer appointed under provincial authority could arrest in this way for an offence committed in another Province of Canada. I say nothing as to offences committed outside of Canada.

By section 22 of the Code, "Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable or probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not." It is argued that this clause merely enables the officer to plead or raise such matter in defence if proceeded against for the arrest. In my opinion, the section operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful. It appears to me,

too, that the clause applies, not only where the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest. In the latter class of cases, as well as in the former, it can properly be said that the offence is one for which the offender may be arrested (by some person) without a warrant.

It is also argued that, even though lawfully arrested, the prisoner is now being unlawfully detained.

The arrest was made yesterday and it is contended that, under paragraph (a) at the end of section 552 of the Code, the accused could not be detained after noon of to-day without being brought before a justice of the peace.

Sub-section 7 authorizes a peace officer to arrest, without warrant, any person whom he finds lying or loitering in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed or being about to commit an indictable offence, and to detain such person until he can be brought before a justice of the peace, to be dealt with according to law. Then follows paragraph (a) "No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice of the peace."

It is argued that the words "so apprehended" apply to all cases of arrest without warrant under any portion of section 552, but looking at the frame of the whole section I would not have thought this the proper construction. If it were, then a person actually found committing a murder or other serious crime could not be detained after noon of the following day, unless in a locality within easy reach of a justice of the peace.

But we find that sub-section 7, with paragraph (a) appended, formed a substantive section (28) of R.S.C. (1886) c. 174. This makes it clear that paragraph (a) applies only to a case coming solely within sub-section 7.

The rule at common law was that one arresting another on suspicion of felony should bring him before a justice of the peace as soon as he reasonably could.

It is claimed on behalf of the officer that no justice of the

peace in Manitoba has jurisdiction to deal with the accused; and counsel for the prisoner, while not admitting this, confesses to being unable to show authority to the contrary.

Just for the present, we assume that this claim is correct, and we will not now determine whether the officer should take his prisoner to Montreal or hold him for the arrival of the warrant, which is said to have issued in Montreal. But as the prisoner's counsel claims there is a difficulty in finding authority for the release of the accused on bail, we will retain the application and enlarge it until Saturday, 14th inst., the accused to be allowed to go on bail to appear then before this Court, unless previously arrested upon a lawful warrant.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J., FALCONBRIDGE AND STREET, JJ., SITTING AS A DIVISIONAL COURT.

THE QUEEN v. McRAE.

Associate justices of the peace—Sole jurisdiction of summoning magistrate—Attendance of other justices at hearing—Interference by —Cr. Code 839, 842, 856.

1. When an accused person is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings without associate justices, other justices of the peace are not entitled to interfere in the preliminary enquiry or summary trial, or to be associated with the summoning justice, except at the latter's request.
2. A summary conviction by the magistrate who summoned the accused and heard the charge will be supported, although three other magistrates attended the hearing and purported to dismiss the charge, if the latter magistrates sat without the request or consent of the summoning magistrate.

ARGUED: May 14, 1897.

DECIDED: May 14, 1897.

Motion to make absolute a rule nisi granted by the court to quash the summary conviction of the defendant, made by

J. B. Horrell, mayor of the town of Midland, and *ex officio* a justice of the peace for the county of Simcoe, for an assault, upon the following grounds :

1. That other justices of the peace for the county of Simcoe, who desired to take part in the hearing of the charge against the defendant, upon the return of the summons issued by Mr. Horrell, had a legal right to take part in the hearing of and adjudicate upon and determine the charge, and Mr. Horrell had no jurisdiction to hear and determine the charge to the exclusion of other justices of the peace for the county of Simcoe who desired to take part in hearing and determining the charge.

2. That three other justices of the peace for the county of Simcoe, duly qualified to hear and determine the charge, and who had jurisdiction in the matter, actually heard and determined the charge along with Mr. Horrell, and gave their judgments dismissing the charge, and gave the defendant a certificate of dismissal in respect of such charge.

3. That the conviction by Mr. Horrell was not a conviction supported by the majority of the justices of the peace who heard and determined such charge, and was illegal by reason thereof.

4. That the justices of the peace who heard such charge disagreed, and no conviction could be made.

It appeared that a summons was issued by Mr. Horrell calling upon the defendant to appear and answer the charge, and that the defendant did appear before Mr. Horrell pursuant thereto, and pleaded "not guilty," whereupon three other magistrates, without the request or consent of Mr. Horrell, appeared and heard the evidence adduced, and gave judgment dismissing the complaint ; but Mr. Horrell gave judgment convicting the defendant of the assault charged, and made a formal conviction under his hand and seal. There was evidence, also, that the other magistrates were present at the request of the defendant.

TORONTO, May 14, 1897.

McCarthy, Q.C., and *D. O. Cameron* supported the rule, and referred to sec. 839 *et seq.* of the Criminal Code, 1892; *Regina* v. *Milne*, 25 U.C. C.P. 94; *Rex* v. *Sainsbury*, 4 T.R. 451; *Brown* v. *Nicholson*, 5 C.B.N.S. 468; *Tarry* v. *Newman*, 15 M. & W. 645; *Ex p. Carignan*, 5 L.C.R. 479; *Regina* v. *Riley*, 12 Ont. Pr. 98.

Aylesworth, Q.C., for the prosecutor, shewed cause and referred to the Consolidated Municipal Act, 1892, sec. 432; Dickinson's Quarter Sessions, 6th ed., p. 11; Archbold's Quarter Sessions, 4th ed., p. 112.

The judgment of the Court was delivered by

ARMOUR, C.J.—

We think there is no difficulty about the case. Mr. Horrell issued the summons, and the defendant appeared before him and pleaded not guilty. Mr. Horrell was then seized of the case, and no other magistrate had a right to sit with him or to adjudicate or interfere in any way, unless at his request. It is not to be tolerated that the accused should bring with him when he comes up for trial partisan justices who insist upon his acquittal. Look at the consequences. Suppose a man were charged with murder and brought before a magistrate, he might, no matter what the evidence, be discharged upon the preliminary hearing by packing the bench with friendly justices. All the justices in each county are equal in authority, but, as it would be contrary to the public interest as well as indecent that there should be a contest between different justices, we must lay down the rule that when a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate shall interfere in the investigation of or adjudication upon the charge, except at his request.

Rule nisi discharged with costs.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE BOLE, Co. J., SITTING AS A LOCAL JUDGE OF THE SUPREME COURT.

FENSON v. NEW WESTMINSTER.

Fine—Deposit of an appeal—Payment out if conviction affirmed —"May"—Cr. Code 880 (c), 880 (e).

1. When a statute confers an authority to do a judicial act upon the occurrence of certain circumstances, and for the benefit of an interested party, the exercise of the judicial authority so conferred is imperative and not discretionary when applied for by the interested party.
2. Cr. Code sec. 880 (e) enacting that the court "may" order the fine and costs to be paid out of moneys deposited pursuant to sec. 880 (c) on taking an appeal, if the conviction is affirmed, is to be construed as giving the court no discretion to refuse the application of the party to be benefited by the making of the order.

DECIDED: October 26, 1897.

Application by the respondents, the corporation of the city of New Westminster, for the payment to them under sub-section (e) of section 880 of the Criminal Code of a fine and costs, out of certain moneys deposited in court by the appellant under sub-section (c) of the said section 880. The appellant Fenson, had appealed from an order of a justice, imposing a fine, and the appeal was dismissed.

Section 880 of the Criminal Code, 1892, is as follows:

Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say:—

(a) If the conviction or order is made more than fourteen days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order is made within fourteen days of the sittings of such court, then to the second sittings next after such conviction or order.

(b) The appellant shall give to the respondent, or to the justice who tried the case for him, a notice in writing, in the

form NNN in schedule one to this Act, of such appeal, within ten days after such conviction or order;

(c) The appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall enter into a recognizance in the form OOO in the said schedule with two sufficient sureties, before a justice, conditioned personally to appear at the said court, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or, if the appeal is against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the appellant (although the order directs imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, may deposit with the justice convicting or making the order such sum of money as such justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit being made, the justice before whom such recognizance is entered into, or deposit made, shall liberate such person, if in custody;

(d) In case of an appeal from the order of a justice, pursuant to section five hundred and seventy-one, for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the next sittings of the court and to pay such costs as are awarded against him;

(e) The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party including costs of the court below, as seems meet to the court,—and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order, and to pay such costs as are awarded,—and shall, if necessary issue

process for enforcing the judgment of the court; and whenever, after any such deposit has been made as aforesaid, the conviction or order is *affirmed*, the court *may* order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever, after any such deposit, the conviction or order is *quashed*, the court *shall* order the money to be repaid to the appellant;

(f) The said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

(g) Whenever any conviction or order is quashed on appeal, as aforesaid, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed.

R. McBride, for the appellant, submitted that the word "may," as used in the sub-section (e), left it in the discretion of the court to grant or refuse the application.

G. O. M. Dockrill, for the respondent corporation.

NEW WESTMINSTER, October 26, 1897.

BOLE, L.J.—

In this case I am asked, under section 880 of the Code, to direct that the fine, costs, and costs of appeal be paid, out of the deposit in court, to the respondent, the appeal having been dismissed, and Mr. McBride relies on the wording of the section, which uses the word "may," as giving me some discretionary power in the matter as to granting or refusing the application; but the rule, I think, is that when a statute

confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arrives, and its exercise is duly applied for by a party interested and having the right to make the application: *MacDougall* v. *Paterson*, 11 C.B. 755; *Julius* v. *Bishop of Oxford*, 5 A.C. 214. In the present case I entertain no doubt as to the sense in which the word "may" is used. I must therefore grant the application and direct the fine, costs and costs of appeal to be paid forthwith to the respondent, out of the deposit in court, and that the balance, if any, be paid to the party entitled thereto.

Order made.

Note:—*Enabling words*—"*May*"—*When compulsory.*

Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised. Per Lord Cairns, L. C., *Julius* v. *Bishop of Oxford*, 1880, 5 App. Cas. 214, 225.

The word "may" is aptly and properly used to confer on the Court an authority, and the rule is that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. Jervis, C. J., in *Macdougall* v. *Paterson*, 1851, 11 C.B. 755; *Reid* v. *Gardner*, 8 Exch. 651; *Jones* v. *Harrison*, 6 Ex. 328, disapproved.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall". *Rex* v. *Barlow*, Salk. 609, Skin. 370, Carth. 293. The words "it shall be lawful" used in a statute merely make that legal and possible which there would otherwise be no right or authority to do, and their natural meaning is permissive and enabling only; so when

Note—*Continued.*

the Church Discipline Act, 3 and 4 Vict. (Imp.) c. 86, provided that it shall be lawful for the bishop of the diocese on the application of any part complaining thereof, or if he shall think fit, of his own mere motion to issue a commission for the purpose of making enquiry as to the grounds of such charge or report, and either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, to send the case by letters of request to the Court of Appeal, etc., it was held that the sections gave the bishop complete discretion to issue or decline to issue such commission. *Julius* v. *Bishop of Oxford*, 1880, 5 App. Cas. 214.

Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right, and if by enabling words a court is empowered to pass sentence on one convicted of a crime, it would be the duty of the Court to pass that sentence. Per Lord Blackburn, in *Julius* v. *Bishop of Oxford*, 1880, 5 App. Cas., at page 245.

Where a statute provided that execution "may" be issued by leave of the court upon motion for a rule to shew cause, and that it shall be lawful for such court to make absolute or discharge such rule, or to make such order therein as to such court shall seem fit, it was held by the Court of Common Pleas that the statute left no discretion to the court, which had nothing more to do than to see that the execution creditor had complied with all the conditions which the Legislature had thought fit to impose upon him, *Morisse* v. *Royal British Bank*, 1856, 1 C. B. N. S. 66; *Hill* v. *London and County Assurance Co.*, 1 H. and N. 398.

But where a statute was in the terms that upon information and complaint laid, etc., the justices receiving the same *may* if they shall think fit issue a summons or warrant, they have a discretion, and if they think the charge frivolous or vexatious they are not bound to grant an application for summonses; what the justices have to consider is whether there was *prima facie* evidence of a criminal offence which in their judgment calls upon the alleged offender to answer.

Note—*Continued.*

If they think there is such *prima facie* evidence, it is their *duty* to issue summonses, and if they refuse not because they disbelieve the evidence or for any other reasonable ground, but from some ground which they ought not to have taken into account, a mandamus may be ordered to compel them to hear and determine the matter of the application for the summonses. *R.* v. *Adamson*, 1875, 1 Q. B. D. 201; *Ex parte McMahon*, 48 J. P. 70.

[COUNTY COURT OF THE COUNTY OF YORK, ONTARIO.]

BEFORE McDOUGALL, CO. J., IN CHAMBERS.

THE QUEEN v. NURSE.

Liquor License Act (Ont.)—Sale by licensee in prohibited hours—Calling defendant as witness for prosecution —Disclosure of several offences.

1. A defendant in a prosecution under the Liquor License Act (Ont.) is compellable to give evidence for the prosecution, although the prosecutor has first called other evidence as to an alleged specific illegal sale, and has failed to prove the same.
2. A defendant may be compelled to testify for the prosecution as to *any* illegal sale on the date charged in the information as that on which the offence took place; and the question put to him need not indicate the name of any alleged purchaser, or other particulars which would limit the enquiry to such charges as the prosecution could give particulars of.
3. The disclosure in the defendant's testimony of several illegal sales made on the same day does not invalidate a conviction thereon for illegally selling liquor, although such conviction does not specify to which of such sales the same relates.

DECIDED: November 2, 1898.

Appeal from a summary conviction of a licensee for selling liquor on Sunday contrary to the provisions of the Liquor License Act (Ont.).

James Haverson for the defendant. Apart from the statutory provisions contained in secs. 95 and 102 of the Liquor

License Act (Ont.) a specific offence would have to be charged. *Rex* v. *Ferguson*, 3 O.S.U.C. 220. The sections operate only to simplify the form of informations, etc., and do not change the method of trial or the law of evidence. Cr. Code 846 as to an order for particulars applies. R.S.O. 1897, c. 90, s. 2. Cr. Code 845 directs that every information shall be for one offence only. *R.* v. *Hasen*, 20 Ont. App. 633. *Milnes* v. *Bale*, L.R. 10 C.P. 591. After giving particulars by examining witnesses as to a specific alleged offence, the prosecutor cannot proceed to enquire as to other occasions to find whether an offence was committed on any of such other occasions. Such a process would be inquisitorial and contrary to the principles of criminal law. An amendment of an information under section 104 of the Act does not justify the substitution of an entirely new charge with which the first is not connected.

W. E. Raney for the Crown. The information is broad enough to cover any sale on the date in question. Sec. 102 of the License Act does away with any power to order particulars in liquor cases, and overrides Cr. Code 846 if the latter ever applied. The fact that the first witness called denied a sale to him did not conclude the case. Although convictions for several offences *may* be made if committed on the same day (License Act, sec. 101, s-s. 4), the Crown may elect to treat the offences conjunctively as one offence. Paley on Convictions, 7th ed. 84, 208-212; Taschereau, Cr. Code 722, 723. The statute is permissive and not compulsory.

TORONTO, November 2, 1898.

MCDOUGALL, Co. J.—

This is an application to quash a conviction made under the following circumstances: Nurse, the appellant, is an hotelkeeper at the Humber, in this county. On Sunday, May 22, several young men went out in a boat on the Humber Bay, and the boat by some means was upset and one young man was drowned. It was stated in the news-

paper accounts that the men were under the influence of liquor, and that this circumstance accounted for the disaster. As the day on which the accident happened was a Sunday, unless the men in the boat brought the liquor with them, it was surmised that they had procured their liquor at one of the hotels at the Humber, and the appellant, Nurse, was suspected of being the hotelkeeper who supplied the drowned man and his companions, and clearly, as it was a Sunday, the liquor must have been supplied within prohibited hours. In view of the gossip on the subject, the license inspector for the district, Mr. Pears, laid an information under the statute, charging Nurse with selling liquor on May 22, during the prohibited hours contrary to the provisions of the statute, and summoned a man named Martin as a witness, as it was said he was one of those in the boat at the time of the accident. The complainant, Mr. Pears, was unable to establish any sale of liquor by Nurse on the testimony of Martin. Mr. Raney, for Pears, then proposed to call the defendant, Nurse, as a witness. He went into the box, and, being sworn, denied positively making any sale of liquor to Martin on Sunday, May 22. Mr. Raney then put this question to Nurse: "Did you sell any liquor to anyone on that day?" Mr. Haverson, for Nurse, objected that the question was improper; that the defendant could not be asked with reference to a sale other than the one to Martin.

The objection was overruled by the Magistrate, and Nurse answered Mr. Raney's question as follows: "To the best of my knowledge I did." This question was followed by others from Mr. Raney, in answer to which Nurse stated in substance that he took orders for drinks into the sitting-room on trays on more than one occasion, and to different people at different times of the day on the Sunday in question; that he supplied different kinds of liquor and was paid for it, but he did not remember the name of any person he served that day. Upon this evidence alone the Magistrate convicted him of unlawfully selling liquor, during the time prohibited by the Liquor License Act.

The complaint here is that the original prosecution was

launched in the belief that a sale to Martin by the defendant would be established, but upon failure to establish this offence, the license inspector, without any notice or particulars, or an intimation that he was proceeding for any other particular offence, put the defendant under oath, and asked him (to summarize his questions): "If you did not sell to Martin, did you sell liquor to anyone else, and to whom, on the Sunday in question?" The answer, after objection, is in effect (also summarized): "I sold liquor to a number of people at different times on that day, but I do not remember the name of anyone I sold to." It is claimed by Mr. Haverson that this inquisitorial method of procedure is not warranted by even the peculiar provisions of the Liquor Act, Evidence Act, and the Code read together, as regulating the conduct of the prosecutions in liquor cases. It certainly shocks our sense of justice and propriety when considered from the standpoint of our previous training in the principles and methods of procedure adopted in criminal or quasi-criminal cases under our English system of jurisprudence. It is only proper I should consider some clauses of the statute and the decided cases, which, it is alleged, support so radical a departure from the procedure and practice followed in all other prosecutions. The first statute to be noticed is the Evidence Act, R.S.O., cap. 73. The defendant, by section 9 of that Act, is competent and compellable, as a witness, to testify, and this prosecution being a proceeding under an Act of the Legislature of Ontario, the defendant is not entitled to the protection of section 5 of the Evidence Act, and cannot, therefore, avoid answering any question on the ground that his answer might criminate him and subject him to a penalty.

Next, as to the procedure. Section 95 of the Liquor License Act, R.S.O., cap. 245, authorizes the laying of the information in form E to the Act, or to the like effect. The information in this case is in the regular form, charging that the defendant, on May 22, in a licensed hotel, sold liquor during prohibited hours, and negativing the production of a medical certificate. Section 101, sub-section 4, enacts that convictions for several offences may be made, though they

were committed on the same day. Section 102 declares that in describing offences it shall be unnecessary to name the kind of liquor, the price, or any person to whom it is sold or disposed, or by whom it is consumed, in any information, summons, conviction or warrant, etc. The conviction in this case follows the general form and language of the information, and is, therefore, regular on its face. The only ground of objection then open to the defendant is as to the proceedings at the trial. The Crown, without giving any particulars in advance—none were expressly demanded in the present case at the trial—could, under the information laid, have called any witness to prove the sale of liquor made by the defendant at any time of the day on May 22. And a sale being established by the testimony of a competent witness, a legal conviction could have followed. Let us suppose a case. A, B and C are called as witnesses. From the questions asked by the complainant it is made manifest that he has been informed that the three were drinking together at 10 a.m. on the particular Sunday in the defendant's bar. They all deny having been in the hotel at all during the Sunday morning. C is then asked: "Were you at the hotel at all on that Sunday?" He replies: "I was there about 6 p.m." "Did you buy any liquor there?" "No." "Did you see liquor sold to anyone while you were there?" Could it be objected because the witness had not proved a sale to himself, or a sale in the morning, that he could not be asked to testify as to a sale in his presence to another or others in the afternoon, and would not a conviction made upon such testimony be valid? Take another case. A witness is asked: "Did you buy any liquor at the defendant's on Sunday, May 22?" He replies: "Yes," and hastens to add: "I was in that hotel six different times on that day, and each time I went in I purchased a glass of whiskey from the defendant." Could it be urged upon such a statement, that because the witness, by his testimony, established the commission of six separate offences on the same day, the Magistrate could not make a legal conviction for one? Surely it would be a perfectly valid conviction to find the defendant guilty of one

offence of a sale on that Sunday, without specifying which of the six offences proved by C the conviction had relation to, and further, without specifying C's name in the conviction as the person sold to.

Here the defendant, who is a compellable and competent witness, is asked: "Did you sell liquor during Sunday, May 22?" To my mind, upon careful consideration of the intention of the language of the Evidence Act and Liquor License Act, this question is a proper one. It is precisely the same in form as one which, in my opinion, would be unobjectionable if asked a witness, not a defendant, namely: "Did you purchase any liquor on Sunday, May 22, at the defendant's hotel?" The Evidence Act (Ont.), as framed, making a person charged a competent and compellable witness, regardless of the criminating effect of answering, has no doubt invaded a most vital principle of procedure in the trial of criminal cases. The Legislature has, however, chosen to sweep away the ancient and supposed sacred right of a British defendant to remain silent and to demand that the charge should be proven against him. He may now be both a witness and a defendant, and in the former capacity is liable to be interrogated to the same extent as any other witness called, and if he admits facts which establish the offence charged, may be duly convicted upon his own admissions. Prosecutions under the Liquor Act are thus placed upon a different footing from proceedings in civil cases. The Act of Parliament has plainly declared that the defendant shall be a compellable as well as a competent witness, and that he shall not be at liberty to refuse to answer because his answer may subject him to criminal proceedings, or to prosecution for a penalty. Any other witness except the defendant, his wife or husband (as the case may be) can, however, avail himself of the protection afforded by section 5 of the Evidence Act (Ont.), and if the answer to the question would tend to subject him—the witness—to criminal proceedings, or to a prosecution for a penalty, he can decline to answer.

In reference to the authorities cited, a careful perusal of *The Queen* v. *Hasen*, 20 Ont. App. 633, will, I think, support

the view that the proceedings at the trial in the present case were regular. In *Queen* v. *Hasen* it was held that the disclosure of two offences in the information and evidence taken in reference to both at the trial did not invalidate the conviction for a single offence; or, to put it in another way, for one of the offences alleged in the information. That was a much stronger case than the present one.

Here the complaint is that the defendant cannot be convicted for an offence on his own testimony, because his testimony shows that he had committed several offences of the same kind on the same day. This contention on the part of the defendant, if acceded to, involves the proposition that until you have made a *prima facie* case by another witness against the defendant you cannot put him in the box with a view of securing evidence from him to convict himself. To hold with the first proposition would be to enable every defendant to escape conviction by glibly confessing to wholesale breaches of the law on a particular day, and to hold with the second would be to destroy a plain meaning of section 9 of the Evidence Act (Ont.), and, in my opinion, frustrate the plain intention of the Legislature. The application to quash the conviction will be dismissed with costs.

Conviction affirmed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE JOHNSTON, COUNTY JUDGE, ACTING AS MASTER OF THE SUPREME COURT.

THE QUEEN v. JOHN McDONALD.

Giving security to keep the peace—Requirements of commitment in default—Negativing malice in complaint—Recital in warrant of commitment—Cr. Code 959 —Code Forms WWW and YYY.

1. A warrant of commitment by a justice under Cr. Code 959 (4), for default in finding sureties to keep the peace must shew on its face that the complainant feared bodily injury because of the defendant's threat, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of his person from injury. (Code Form WWW.)

DECIDED: December 24, 1897.

Motion for the defendant's discharge under a writ of habeas corpus.

The defendant had been arrested and brought before the Stipendiary Magistrate for the city of Halifax for threatening the complainant in these words: "By Jesus Christ, I will kill you."

The Magistrate required him to find sureties to keep the peace, and as he failed to do so he was committed to gaol for three months.

The complaint was in the Form WWW. in the schedule to the Criminal Code, but the warrant of commitment merely recited that the prisoner threatened the complainant with serious bodily injury by saying the words before mentioned, and that he had been required by the Magistrate to enter into a recognizance with sureties, and had failed to do so; but the warrant did not state that the complainant feared bodily injury from the defendant because of the threat alleged, nor that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of her person from injury, pursuant to Forms WWW. and YYY. in the schedule of the Criminal Code.

Section 959 (2) of the Criminal Code provides that: "Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he the complainant is afraid that such other person will do him, his wife or child some personal injury, [or will burn or set fire to his property,] the justice before whom such complaint is made, may if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security to keep the peace and to be of good behaviour, for a term not exceeding twelve months."

By sub-section 4 of section 959, "If any person so required to enter into his own recognizances or give security as aforesaid, refuses or neglects so to do, the same or any other justice may order him to be imprisoned for any term not exceeding twelve months;" and by sub-section 5, "The Forms WWW., XXX. and YYY., with such variations and additions as the circumstances may require, may be used in proceedings under this section.

Form WWW. of the Criminal Code is of a "Complaint by the party threatened for sureties for the peace," and after setting forth the threat charged proceeds as follows:

"And that from the above and other threats used by the said *A.B. (the accused)* towards the said *C.D. (the complainant)*, he the said *C.D.* is afraid that the said *A.B.* will do him some bodily injury, and therefore prays that the said *A.B.* may be required to find sufficient sureties to keep the peace and be of good behaviour towards him the said *C.D.;* and the said *C.D.* also says that *he does not make this complaint against nor require such sureties from the said* A.B. *from any malice or ill-will, but merely for the preservation of his person from injury.*

Form XXX. is of the recognizance to keep the peace.

Form YYY. is of the commitment in default of sureties. The last mentioned form follows immediately after Forms WWW. and XXX. and includes a recital of the complaint as follows: "That *A.B. of*, etc., on the ——— day of ——— at ——— aforesaid, did threaten, etc., *(follow to the end of complaint as in form above in the past tense.")*

A writ of habeas corpus was granted and the gaoler returned the warrant of commitment.

J. J. Power for the defendant.
W. F. McCoy, Q.C., for the Magistrate and the informant.

HALIFAX, December 24, 1897.

JOHNSTON, Co. J.—

I consider that the warrant of commitment is bad, inasmuch as it does not comply with and follow the form of commitment in default of sureties, given in the Code. I order that the defendant be discharged from custody under the said warrant, but that no action be brought against the Stipendiary Magistrate or other officer in respect of anything done in respect of the arrest and commitment of the said defendant John McDonald.

Order for prisoner's discharge.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE SIR GEORGE BURTON, C.J.O., OSLER, MACLENNAN AND MOSS, JJ.A.

Re GROSS.

Extradition—'Larceny'—Convention of 1889 with U.S.A.—Common law offence—Cr. Code 305.

1. Under the Extradition Convention of 1889 between Great Britain and the United States by which 'larceny' was made an extraditable crime, whatever was then larceny both in Canada and in the State in which the alleged crime was committed was thereby made an extradition offence.
2. The abandonment of the term 'larceny' in Canadian jurisprudence on the enactment of the Criminal Code of Canada subsequent to an extradition convention including such offence, does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Criminal Code still an offence in Canada under the name of 'theft' or 'stealing.'

ARGUED: February 10, 1898.

DECIDED: February 18, 1898.

Appeal by William Gross, a prisoner confined in gaol under an extradition warrant in respect of certain charges of larceny, from an order of Rose, J., dismissing an application for his discharge on the return to a writ of habeas corpus.

J. F. Faulds, for the prisoner.

J. W. Curry, contra.

TORONTO, February 18, 1898.

The judgment of the court was delivered by

OSLER, J.A.—

This was an appeal by William Gross, a prisoner confined in the common gaol of the county of York, from the judgment of Mr. Justice Rose, dismissing an application for his discharge when brought up on a writ of habeas corpus, and remanding him into custody. It appeared that the prisoner had been committed for extradition to the United States

under four several warrants of the Judge of the County Court of the county of York, in respect of four charges of larceny alleged to have been committed by him in the State of Pennsylvania. These charges as expressed in the warrants are as follows: "the crime of larceny in that he did feloniously steal;" in the case of Reuben Ehret "one diamond ring of the value of $115 of the goods and chattels of Reuben Ehret;" in the case of Faust & Sterner, "three diamond rings of the value of $375 of the goods and chattels of Faust & Sterner;" in the case of E. Keiler & Son "two diamond rings of the value of $275 of the goods and chattels of E. Keiler & Son;" and in the case of Charles Meinhofer "one diamond ring of the value of $45 of the goods and chattels of Charles Meinhofer."

It is objected on behalf of the prisoner that he has not been accused of an extradition crime, or if so accused, that there is not sufficient evidence to justify his committal for extradition.

The existing extradition arrangement between Great Britain and the United States is found in the 10th article of the Ashburton Treaty (1842), and in the convention of the 12th of July, 1889, between Her Majesty and the United States, ratifications of which were exchanged at London on the 11th of March, 1890, by which the provisions of the 10th article of the treaty were made applicable to many additional crimes, *inter alia* to that of larceny. In 1877 the Parliament of Canada passed an Act, 40 Vict. ch. 25, to make provision for the extradition of fugitive criminals under then existing or any future treaties or arrangements which might from time to time be made between Her Majesty and foreign states. This Act is now found in the Revised Statutes of Canada, (1886), ch. 142 "The Extradition Act." By an order of Her Majesty the Queen in Council, dated the 17th of November, 1888, it was directed that the operation of the Imperial Extradition Acts of 1870 and 1873, for giving effect to extradition arrangements, should be suspended within the Dominion so long as the Dominion Act of 1886 should continue in force and no longer. And finally by a further

Imperial Order in Council of the 21st of March, 1890, for bringing into force by publication the convention of the 12th of July, 1889, it was ordered that the Imperial Extradition Acts of 1870 and 1873 should "apply in the case of the United States and of the said convention with the United States," but it was again also ordered that their operation should be suspended within the Dominion of Canada so long as the provisions of the Canadian Act of 1886 continued in force: see Statutes of Canada, 1890, 53 Vict., Imperial Orders in Council, p. xliii.

The treaty, the convention of 1889, and the Extradition Act, R. S. C. ch. 142, constitute the existing law governing the extradition of criminals from this country to the United States.

Section 2 (b) of the Extradition Act enacts that the expression "extradition crime" may mean any crime which if committed in Canada would be one of the crimes described in the first schedule to the Act, and in the application of the Act to the case of any extradition arrangement means any crime described in the arrangement, whether comprised in the first schedule or not.

In the schedule, we find, under the heading "list of crimes," item 5, "larceny." The crime of larceny is therefore described—it may perhaps be more accurately said, specified—both in the extradition arrangement and in the schedule of extradition crimes to the Extradition Act.

Mr. Faulds, if I rightly understood his contention, urged that inasmuch as larceny is now by that name not a crime mentioned in our Criminal Code of 1892, 55-56 Vict. (Can.) ch. 29, it is no longer an extradition crime. It would be strange indeed if a change in the name of the thing, which is not even the name employed in describing it in an indictment, should produce so alarming a result. Whatever was larceny here and in Pennsylvania, whether by common law or by statute at the time of the convention in 1889, was thereby made an extradition crime. Larceny at common law was plain theft—the wrongful taking and carrying away the property of another with the felonious intent to convert it to

Note—*Continued.*

forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other;

Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or the person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed;

And the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made upon oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.

The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

A supplementary Convention or treaty was entered into on 12th July, 1889, and ratifications of same were exchanged on 11th March, 1890. By it the provisions of Article X. of the Ashburton Treaty were made applicable to the following additional crimes:

1. Manslaughter, when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

Notes—*Continued.*

6. Rape, abduction, child-stealing, kidnapping.

7. Burglary, house-breaking, or shop-breaking.

8. Piracy by the law of nations.

9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading. (Convention of 1889, Article I.)

But if the alleged offence be of a "political character" or if the fugitive proves that his surrender is asked "with a view to try to punish him for an offence of a political character," he shall not be surrendered. (Conv. of 1889, Article II.)

Participation in extraditable offence.

Extradition is also to take place for participation in any of the crimes mentioned in the Convention of 1889, or in Article X. of the Ashburton Treaty, provided such participation be punishable by the laws of both countries. (Conv. of 1889, Article I.)

Convicted Persons—Proof of identity, and of conviction.

The provisions of both treaties are by Article VII. of that of 1889, declared to apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers. *Re Levi* (1897) 1 Can. C. C. 74; *Re Garbutt* (1891) 21 Ont. App. 465.

Notes—*Continued.*

Surrendered person not to be held for other crimes.

No person surrendered shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. (Conv. of 1889, Article III.)

Articles in possession of fugitive.

Article IV. of the 1889 Convention, provides that all articles seized which were in the possession of the person to be surrendered, at the time of his apprehension, whether being the proceeds of the crime or offence charged, or being material as evidence in making proof of the crime or offence, shall so far as practicable, and if the competent authority of the state applied to for the extradition has ordered the delivery thereof, be given up when the extradition takes place. Nevertheless the rights of third parties with regard to the articles aforesaid shall be duly respected.

[COURT OF QUEEN'S BENCH, QUEBEC.]
CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. HARRIS.

Juror—Omission to challenge for cause—Communication between prosecutor and juror — Weight of evidence—Question for jury—New trial—Cr. Code 668, 733.

1. If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial.
2. When a defendant and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor affect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial.
3. It is the province of the jury, after taking into consideration the circumstances of a case and the character and demeanour of the witnesses, to discredit some of the witnesses and reject their evidence, and to believe others and accept their evidence; and when there is a conflict in the evidence, but there is evidence to support the verdict, it cannot be juridically maintained that the verdict is against the weight of evidence.
4. When, however, there is no conflict in the evidence, and it tends indubitably in a direction favorable to the defendant, or does not establish his guilt, a verdict convicting the defendant would not be supported by nor be based upon proper evidence, and would manifestly be against the weight of evidence; and it is only in cases like this, where there is an absolute failure of evidence to sustain the verdict, that the Court can give leave to apply to the Court of Appeal for a new trial.

MONTREAL, November 21, 1898.

WURTELE, J.—

The prisoner, Lee Harris, was indicted for having on the 13th September, 1898, at the City of Montreal, stolen $500.00 of the moneys of one James Douglass, and he was found guilty by the petit jury on the 9th November instant.

The next day his counsel moved for a reserved case on two grounds: (1) Because one of the jurors, named Alexander Fisher, was actuated by bad feelings against him on account

of previous business relations between them, and he had omitted to challenge him, not having recognized him when the jury was impanelled ; and (2) Because the private prosecutor had had a conversation with Alexander Fisher, one of the jurors, about the case during the midday adjournment of the Court. At the same time his counsel moved for leave to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence.

It appeared that the private prosecutor was desirous of purchasing a confectionery business on St. Lawrence Street in Montreal ; that he had employed the prisoner as a broker to negotiate the purchase, and had entrusted him with the sum of $500.00 to be applied on the price ; that the prisoner was to return the money on the 13th September last, if the purchase was not then effected, and that it was not effected ; that when the private prosecutor called for his money the prisoner suggested the purchase of a confectionery business at Westmount belonging to one Law Whiteley ; and that they went together to visit the latter's establishment. Up to this point both parties agreed in their statements ; after that, they differed. The private prosecutor swore that he had positively refused to buy the Westmount confectionery business, that he had demanded his money and could not get it ; while the prisoner swore that the private prosecutor had agreed to buy it for a price not to exceed $900.00, and that he had consequently, on the evening of the 13th September, completed the purchase of it for him from Law Whiteley for the price agreed upon of $900.00. To corroborate his story, the prisoner produced James Lowe, his son Michael Harris, a boy of the age of fourteen years, and Edward H. Horner, as witnesses ; and they swore that they had heard the private prosecutor say that he would take the business for $900.00, and that the difference, if the prisoner could get it for a lesser sum, would be for him. But Edward H. Horner's character was impeached by witnesses in rebuttal.

The jurors were charged that the credibility of the witnesses, after due consideration of all the circumstances

of the case, was entirely a question for their decision; and that it was their function and province to give the evidence such credit only as, upon the whole, they might think that it deserved. They were also charged that if, owing to the contrariety between the evidence for the Crown and that for the defence, a grave doubt should arise in their minds as to whether the prisoner was innocent or guilty, they should give him the benefit of the doubt.

I have now to consider and decide the three points or questions raised by the motion, and I will take them up in the order in which I have mentioned them.

The first point is that the juror, Alexander Fisher, was actuated by bad feelings against the prisoner, and that he had failed to challenge him because he had not recognized him. The juror in question, by an affidavit, emphatically denied that he had ever had any bad feeling towards the prisoner, and denied the prisoner's statement of the facts on which he founded his belief of the existence of such hostile feeling. But, at any rate, the facts set up on this point do not authorize the avoidance of the verdict and a new trial. The prisoner might when the juror was called to the book have challenged him for cause, because, in consequence of the existence of private enmity, he was "not indifferent between the Queen and the accused"; but it is too late to do so after the verdict. Should a prisoner inadvertently omit to challenge a juror who entertains a hostile feeling against him, his only recourse, after a verdict convicting him, would be an appeal to the Crown for the exercise of the prerogative of mercy, on which, if the Minister of Justice entertains a doubt whether he ought to have been convicted, he may direct a new trial. I cannot, therefore, reserve this point for the consideration of the Court of Appeal.

The second point is that there had been communication during an adjournment of the court between the private prosecutor, James Douglass, and the juror, Alexander Fisher, about the case, and that the verdict should be annulled in consequence of the juror's misconduct. It is clear that a verdict should

be avoided, and that a new trial should be ordered whenever there has been a communication between one of the parties in a case and a juror of a nature to affect and bias the latter's opinion ; but although any communication between a party and a juror is improper, still an unpremeditated and innoxious conversation which could not affect the juror's mind and judgment cannot have that effect. In the present case the private prosecutor and the juryman met accidentally, and the latter addressed the former, and spoke to him about South Africa, from which he had recently come, and about the business which he had commenced to carry on on St. Catherine Street East, and then told him that he was on the jury ; and thereupon the private prosecutor merely remarked that he entertained no animosity against the prisoner, and would not be sorry to see him acquitted. While it was improper for the juror to speak to the private prosecutor, whose evidence he had just heard, still the conversation was an innocent one, and the remark made by the private prosecutor was not prejudicial to the prisoner, and could not produce in the juror's mind any bias against him, and it was not one of which he can reasonably complain. I am of opinion that the communication complained of affords no ground for an avoidance of the verdict and for a new trial ; and I must therefore refuse also to reserve this point for the consideration of the Court of Appeal.

I now come to the last point—the request to give leave to the prisoner, who has been convicted, to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence.

We have to see what is meant by the weight of evidence?

The credibility of the witnesses who have given evidence is a matter entirely within the scope of the inquiry of the jurors, who can give to the evidence of any of the witnesses who may have been heard in a case such credit as they may think it is entitled to under the circumstances of the case, or from the character or demeanour of the witnesses. They are at liberty to discredit some of the witnesses and to reject their evidence as unworthy of belief, and to believe others,

and to accept their evidence as veracious and worthy of credit. When, therefore, there is divergence between the evidence adduced by the Crown and that adduced by the defence, and the jurors have exercised the discretion which is allowed to them by rejecting the evidence given on one side or on the other, and their verdict is supported by and founded on the evidence which they believed and accepted, the verdict is not against the weight of evidence. In forming their opinion as to the credibility of the witnesses, the jurors are not bound to accept the evidence given on any side because there are more witnesses on that side than on the other. To oblige them to do so would infringe on their function to consider weigh and pass upon any evidence adduced, and then to accept or to reject it in their discretion.

It is the province of the jury to pass upon the credibility of witnesses, and then to render such a verdict as their own judgment and consciences dictate. To say, therefore, in such a case that the judge should take all the evidence into consideration, and give the preponderance or weight of evidence to the side having the greater number of witnesses, would be to ignore one of the principal and most important functions of a jury, and to substitute the judge's opinion for that of the jury.

When, after having rejected the testimony of the witnesses whom the jurors disbelieve, in the case of a conflict in the evidence, there is evidence which directly supports the allegations of the indictment, the jury is authorized to convict; and although the Court may be apprehensive that the jury may have been mistaken in its conclusion, still it is for the jury and not for the judge to pass upon the credibility of the witnesses and the weight or sufficiency of the evidence. (See 4 American and English Encyclopædia of Law, *verbo* "Criminal Procedure," page 856.)

When, however, no evidence is adduced by the prisoner, or when there is no conflict in the evidence of the opposite parties and in either case the evidence tends indubitably in a direction favorable to the prisoner, or at least does not clearly establish his guilt, in such a case a verdict convicting

a prisoner would not be supported by and based upon such proof as the prosecution is bound to make in order to establish the guilt of the accused, and would manifestly be against the weight of evidence. It is in cases like this, when it is claimed that there is an absolute failure of evidence to sustain the verdict, that the Court before which the trial has taken place may give leave to a person who has been convicted, to apply to the Court of Appeal for a new trial.

In the present case the verdict is supported by direct evidence, given by a witness whose character and reputation have not been attacked or impeached in any way; and for me or for the Court of Appeal to say that it is against the weight of evidence would be to ignore the jury, and assume the jurymen's function of discrimination with respect to the evidence which they heard.

The motion for leave to apply to the Court of Appeal for a new trial is therefore rejected.

But while I accept the verdict of the jury, and while I am constrained to refuse leave to apply for a new trial, I have serious doubts myself as to whether the evidence adduced by the defence should have been disbelieved, and at all events I incline to think that it was at least of a nature to raise a serious doubt of which the prisoner should have had the benefit. Under these circumstances, using the discretionary power conferred upon me by Article 733 of the Criminal Code, I direct and order that the prisoner be discharged from custody on his entering into a recognizance with two sureties to appear and receive judgment whenever called upon, and meantime to keep the peace and be of good behaviour, and that he himself be bound in the sum of $750.00 and each of his two sureties in the sum of $375.00.

James Crankshaw, for the prisoner.

J. P. Cooke, Q.C., for the Crown.

Note: *Juryman—Challenge for cause—Objection "for favor."*

Section 668, s-s. 4, of the Criminal Code sets forth the grounds of challenge of jurymen for cause, and is as follows:

668 (4.) Every prosecutor and every accused person is entitled to any number of challenges on any of the following grounds; that is to say:

(*a.*) that any juror's name does not appear in the panel: Provided that no misnomer or misdescription shall be a ground of challenge if it appears to the court that the description given in the panel sufficiently designates the persons referred to; or

(*b.*) that any juror is not indifferent between the Queen and the accused; or

(*c.*) that any juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labor or exceeding twelve months; or

(*d.*) that any juror is an alien.

It has been held that before the prisoner is put to his challenges, he has the right to have the whole panel called over to ascertain which of the persons summoned as jurors appear and which are exempt or are to be excused; *R.* v. *Frost* (1839), 9 C. & P. 129, 135; Roscoe's Cr. Evid., 11th ed., 197; but this is now subject to the provisions of sec. 667 of the Criminal Code, by sub-section 7 of which the names of the jurors on the panel are to be called "until such a number of persons have answered to their names as, in the opinion of the Court, *will probably be sufficient* to provide a full jury after allowing for challenges of jurors and directions to stand by."

The practice is not uniform as to the time of swearing the jurymen; in some courts the first juryman who answers is sworn as soon as he enters the box, and in others it is the practice to get a full jury into the box, and then to commence swearing them. Roscoe's Cr. Evid., 11th ed., 197.

The challenge must be before the juryman is sworn, and he cannot be challenged afterwards except by consent. *R.*

Note—*Continued.*

v. *Mellor*, 4 Jur. N.S. 5, 214, (per Wightman, J.); *R.* v. *Coulter* (1863), 13 U.C.C.P. 299, 301.

"The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." *R.* v. *Frost* (1839), 9 C. & P. 129, 137, (per Tindal, C.J.)

The withdrawal of an unqualified or disqualified person who has been sworn as a juror, at the request of the prisoner and by the consent of the Crown, before the whole jury is completed and sworn does not re-open the right of challenge as to those previously sworn nor make it necessary that such jurors should be re-sworn. *R.* v. *Coulter* (1863), 13 U.C.C.P. 299 (Draper, C.J., Richards and Morrison, JJ.)

That the juror has visited the prisoner as a friend since he has been in custody, is not a good cause of challenge for cause, on the ground of being "not indifferent" between the Queen and the accused. *R.* v. *Geach* (1840), 9 C. & P. 499.

It is not allowable to ask a juryman when called if he has not previously to the trial expressed himself hostile to the prisoner, but statements made by the juryman which are relied on as cause for challenge must be proved by some other evidence. *R.* v. *Edmonds*, 4 B. & Ald., 471; *R.* v. *Cooke*, 13 How. St. Trials, 333.

The prisoner must show all his causes of objection before the Crown is called upon to show cause; Chitty, Cr. Law, vol. I., 534; *Whelan* v. *The Queen* (1868), 28 U.C.Q.B. 2, 49; and as between different prisoners whichever begins to challenge must finish all his challenges before the other begins. Ibid, p. 49; Co. Lit. 158a. A prisoner is entitled to challenge for cause before he has made all or any of his peremptory challenges. *Whelan* v. *The Queen* (1868), 28 U.C.Q.B. 2. "He had the right to deal with them when and in what manner he pleased, subject only to those necessary and convenient rules

Note—*Continued.*

for the conduct of business, which the court might have seen fit to adopt." Per Adam Wilson, J., Ibid, p. 50.

If the prisoner whose challenge of a juror for favor has been disallowed, chooses then to challenge the juror peremptorily, he waives the benefit of any exception to the disallowance of his challenge for favor. *Stewart* v. *The State* (1853), 13 Arkansas Rep. 720; approved in *Whelan* v. *The Queen*, 28 U.C.Q.B., at p. 55; *Freeman* v. *People* (1847), 4 Denio, N.Y., 61.

[SUPREME COURT OF NEW BRUNSWICK.]

THE QUEEN v. WRIGHT.

County Courts (N.B.)—Goal Delivery—Failure to Arraign Prisoner—Habeas Corpus—Carnal Knowledge of Girl Under Fourteen—Cr. Code, 268, 270, 538, 539, 540.

1. The County Courts of New Brunswick are not Courts of Oyer and Terminer and general goal delivery.
2. The failure to arraign a prisoner for trial at the sittings of the court at which he should have been tried does not entitle him to a discharge on *habeas corpus*.
3. A County Court in New Brunswick has jurisdiction to try the offence of attempting to have carnal knowledge of a girl under fourteen (Cr. Code 270), although the evidence discloses the offence of attempting to commit rape, as to which said court has no jurisdiction. (Cr. Code 540.)

ARGUED: November 4, 1896.

DECIDED: November 13, 1896.

This was an application for the discharge from arrest and imprisonment of Charles Wright, under an order in the nature of a writ of habeas corpus, pursuant to the provisions of Con. Stat., N.B., c. 41. The prisoner was on July 20, 1896, committed for trial by the police magistrate of the City of Fredericton, and imprisoned in the common gaol of York County, on a charge of attempting to have carnal knowledge of a girl under the age of fourteen years: the

Criminal Code, 1892, s. 270. The Judge of the County Court of York refused to try him, as he was of the opinion that the depositions disclosed an attempt to commit a rape, an offence over which, by the provisions of the Criminal Code, 1892, s. 540, he had no jurisdiction. The prisoner was not taken before the County Court Judge to make an election for trial as required by the Criminal Code, 1892, part LIV., nor was he delivered for trial at the next session of the York County Court, which opened on October 6th, 1896, and adjourned sine die on the 9th of the same month. Afterwards counsel made the application on his behalf to Mr. Justice VanWart, who referred it to the full bench.

FREDERICTON, N.B., November 4, 1896 :—

Crocket supported the application. The prisoner was entitled to a trial in the County Court under the provisions for speedy trials, or at the regular session of the Court next ensuing his commitment. There is now no lawful warrant for his detention. No question can arise as to the Court having jurisdiction to try an offence under s. 270. There can in law be no attempt to commit a rape on a girl under fourteen years of age. Section 266 defines rape as "the act of a man having carnal knowledge of a woman who is not his wife, etc." Webster, Worcester, the Standard and the Century dictionaries define "a woman" as an adult human female ; that is a female who has passed the age of puberty. *Blackburn* v. *The State*, 22 Ohio, 102, decides that a female ceases to be a child and becomes a woman within the meaning of an Act prescribing punishment for rape, at the age of puberty. That being so, s. 269 is relied on as fixing in law the age of puberty as well as the age of consent. Admitting that there can be in law an attempt to commit a rape on a girl under fourteen, it is submitted that the County Court had jurisdiction ; in other words, that s. 540 of the Code is ultra vires of the Parliament of Canada : The British North America Act, s. 91, sub-s. 27 ; s. 92, sub-s. 14 ; *In re County Courts of British Columbia*, 21 Can. S.C.R. 446.

White, Solicitor-General, contra, cited *Regina* v. *Ratcliffe*, 10 Q.B.D. 74 ; *Regina* v. *Baylis*, 4 Cox C. C. 23. This court cannot discharge under habeas corpus in such a case as this : 3 Broom & Hadley's Com. 145 ; 4 Bacon's Abr. B, Habeas Corpus 138; 1 Chitty's Crim. Law 132 ; *Rex* v. *Marks*, 3 East 157 ; *In re Parker*, 5 M. & W. 32 ; *Rex* v. *Bowen*, 9 C. & P. 509 ; The Criminal Code, 1892, ss. 631, 752.

Crocket in reply.

FREDERICTON, November 13, 1896.

The judgment of the court was delivered by

TUCK, C.J.—

An application was made to Mr. Justice VanWart, under the Act of Assembly relating to habeas corpus, and on the 16th day of October, 1896, the learned Judge made an order directing the keeper of the gaol of the County of York, to return to him whether or no Charles Wright was at that time detained in the said gaol, together with the cause of his detention. After a hearing before the Judge the matter was referred by him to this court.

It appears from the affidavit of Mr. Crocket that the prisoner was charged before John L. Marsh, Esq., Police Magistrate of the City of Fredericton, that he, the said Charles Wright, on the 2nd day of July, 1896, at the City of Fredericton, in the County of York, unlawfully did attempt to have carnal knowledge of Ada Agnes Burt, a girl under the age of fourteen years, to wit, of the age of twelve years and seven months.

After an examination before the magistrate the prisoner was, on the 20th July, 1896, committed for trial at the next session of the County Court of the County of York.

It is also stated in Mr. Crocket's affidavit that he made several applications to James Steadman, Esquire, Judge of the County Court of York, to try the prisoner without a jury under the Speedy Trials Act.

That finally, on the 19th day of September, 1896, Mr.

Crocket enquired of the Judge if he had come to a decision in the matter, and his answer was that he would not undertake the trial of the prisoner unless Mr. Barry (clerk of the County Court) was anxious that he should do so, and the prisoner has never been taken before the Judge of the said County Court to make election under the provisions of the Speedy Trials Act.

A regular session of the County Court for York was opened before Judge Steadman an the 6th and adjourned on the 9th of October, 1896, and this was the first session of the Court since Wright had been committed for trial. No indictment was preferred against him at this court, and he was not delivered for his trial.

It is contended on behalf of the prisoner that he had the right to be tried either under the sections of the Criminal Code, 1892, providing for speedy trials of indictable offences, or at the first session of the York County Court after he had been committed for trial; and that as he was not permitted to have either of such trials, he is entitled to his discharge.

Upon the charge for which the defendant was committed he ought, under the statute, to have had either a speedy trial, or to have been tried at the County Court held at Fredericton in October, 1896. It seems clear that the magistrate committed the prisoner under s. 270 of the Criminal Code, which enacts that "Everyone who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence, and liable to two years imprisonment, and to be whipped." Having read the depositions taken before the magistrate at the preliminary examination, I am convinced that this is the charge upon which the prisoner should have been tried, either by the Judge alone, or before the Judge with a jury. In coming to the conclusion that he had no jurisdiction to try the prisoner, the Judge must have thought that the depositions disclosed an offence under s. 268 of the Code, which enacts that "Everyone is guilty of an indictable offence, and liable to seven years' imprisoment, who attempts to commit rape;" and by s. 540 of the Code power to try the last named offence under s. 268 is taken away from every County Court Judge in the Province of New

Brunswick. By the County Court Act, Con. Stat. N.B., c. 51, s. 62, it is enacted that "The several County Courts of this Province shall have original concurrent jurisdiction within their respective counties with the several Circuit Courts of this Province of all crimes (which are not capital), offences and misdemeanors committed within their said respective counties," etc. This section gave jurisdiction to County Courts of the crime of attempt to commit rape, as that crime is not capital. Section 540 of the Code takes away that jurisdiction from the County Courts of New Brunswick. It is argued that this section is ultra vires the Parliament of Canada because by sub-s. 14 of s. 92 of the British North America Act, Provincial Legislatures were empowered to make laws regarding the administration of justice in the provinces, including the constitution, maintaining and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in criminal matters in those courts. By s. 91, sub-s. 27 of the British North America Act, the Parliament of Canada is given the power to regulate the procedure in criminal matters. The power of parliament to legislate as to the jurisdiction of Provincial Courts in criminal matters is excluded by sub-s. 14 s. 92 of the Act. If then s. 540 of the Code is legislation as to criminal jurisdiction, it would seem to be beyond the power of Parliament, and to be in conflict with Con. Stat. N.B. c. 51, s. 62, which gives County Courts in this province jurisdiction of all crimes which are not capital. But with my view of the present case it is not necessary to decide this point of jurisdiction.

In re County Courts of British Columbia, 21 Can. S.C R. 446, the question of the powers of Parliament and the Provincial Legislatures as regards the administration of justice and procedure in criminal matters is discussed.

Quite a lengthy argument was addressed to us to the effect that there cannot under the Code, be an attempt to commit a rape on a girl under fourteen years of age, and it was said that by the Code rape or an attempt at rape, can only be committed on a woman who has arrived at the age of puberty, whatever that age is. I am not called upon at present

to decide this point, because I am fully of the opinion that Judge Steadman, from the evidence before him had power to try this case, even if he thought there had been an attempt to commit rape.

Another contention is that the judge should have delivered the gaol at the first session of the County Court held in York after the prisoner was committed. I am inclined to think that the Provincial County Courts are not courts of oyer and terminer and general gaol delivery, as the circuits of the Supreme Court are. Criminal jurisdiction is given to the County Courts by the statute, but nothing is said to the effect that they are courts of general gaol delivery. Section 538 of the Criminal Code enacts that every court of oyer and terminer and general gaol delivery has power to try any indictable offence and no exception is made to this power by s. 540. The courts mentioned in s. 539 have their power limited by s. 540. So far as the Parliament of Canada has the power to say so it has said that County Courts in New Brunswick are not courts of oyer and terminer and general gaol delivery.

By the sections of the Code providing for speedy trials, the prisoner may be tried for offences other than those for which he has been committed.

While, however, I am of the opinion that Judge Steadman should have tried the prisoner either under the speedy trials clause in the statute, or at the court held in Fredericton in October, 1896, yet because no such trial took place, it does not follow that the prisoner should go free and not be tried at all. Even if the Judge of the County Court should have delivered the gaol and should have tried the prisoner, this court will not discharge the prisoner, but if necessary will remand him that he may be tried on the charge upon which has been already committed, or for another offence; see 4 Bacon's Abr. B. 134; 1 Chitty's Criminal Law, 132: *Rex* v. *Marks*, 3 East 157; *The Canadian Prisoners*, 5 M. & W. 33; The Criminal Code, s. 752.

I think the ends of justice will be met if Mr. Justice Van Wart refuse to discharge the prisoner on habeas corpus, and if at the same time he make an order directing Judge Stead-

man without delay to try the prisoner under the speedy trials sections of the Code; or if the prisoner demand a trial by a jury, then that the judge try him at the next term of the York County Court.

Remitted to MR. JUSTICE VANWART *to give judgment accordingly.*

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MARTIN, J.

THE QUEEN v. BOWMAN.

Summary conviction—Appeal after plea of guilty—Objection not taken below—Cr. Code 882—R.S.B.C. c. 176, s. 70—Re-opening case to revise fine.

1. Under the Summary Convictions Act (B.C.), sec. 75, (similar to Cr. Code 882), an objection on an appeal from a summary conviction that the by-law under which the prosecution took place is *ultra vires* is not available unless raised on the hearing before the magistrate.
2. On an appeal from a summary conviction had upon a plea of guilty the case should not be re-opened and witnesses called as to the merits for the purpose of revising the punishment imposed, if the magistrate has not acted oppressively.

DECIDED: October 28, 1898.

This is an appeal, under the provisions of the Summary Convictions Act, R.S.B.C., cap. 176, secs. 70 *et seq.*, from the conviction of the appellant William Gile Bowman, hackman, on the 25th of August last, by the Police Magistrate of the city of Victoria, for an infraction of section 22 of the Street By-law of the city of Victoria, in that the defendant did, to quote the summons and conviction, "while driving a hack along Birdcage Walk towards town keep to his right hand side, he then and there not passing another horse and vehicle going in the same direction or standing still."

Section 22 of the said by-law is as follows:—

"Every person riding or driving along any street shall

keep to his left hand side, except when passing another horse or vehicle, which is going in the same direction or standing still."

The accused pleaded "guilty," and was fined $50 and $2 costs.

Bradburn for defendant.

R. Higgins for prosecutor.

MARTIN, J.—

Mr. Bradburn, on the hearing of the appeal, proceeded to argue that the by-law was *ultra vires*, and quoted cases in support of his contention. Whereupon Mr. Higgins, for the respondent, took the objection that under section 75 of the said Act, the point as to whether the by-law was *ultra vires* or not could not be raised on this appeal, because it was not raised before the Magistrate.. Section 75 provides that no judgment shall be given in favor of the appellant if the appeal is based on any objection for any defect in the proceedings "in substance or in form . . . unless it is proved before the court hearing the appeal that such objection was made before the Justice before whom the case was tried and by whom such conviction, judgment or decision was given. . . ."

It is admitted that the objection was not taken before the Magistrate.

In England, under the Summary Jurisdiction Acts, the appellant must, in his notice of appeal to general or quarter Sessions, give the general grounds of his appeal. Stone's Justice's Manual (1897), p. 88; article, "Summary Jurisdiction Appeal."

In Ontario, by section 6, cap. 92, of R.S.O., 1897, (the Act respecting the procedure on Appeals to the Judge of a County Court from Summary Convictions), such Judge may, if he is of the opinion that the conviction may be erroneous, grant a summons to show cause why the conviction should not be quashed.

Under our Act, however, the appellant is not required to give any grounds of appeal, and there is no procedure similar

to the application for the summons in Ontario, the consequence being that unless objections are taken before the Magistrate, the respondent here would be surprised and placed at a disadvantage by having objections advanced against his proceedings without warning of their nature.

It seems to me that this section 75, which goes much further than the corresponding section 15 of the said Ontario Act, or the English Summary Jurisdiction Act, 1848, (11 and 12 Vic.. cap. 43, sec. 1), is designed to compel all objections to be taken before the Magistrate, thus giving him an opportunity to rule on them, and so, in many cases, prevent fruitless litigation. To construe the section otherwise would enable a defendant to conceal his real defence at the trial, and afterwards have the prospect of obtaining a reversal of the judgment recorded against him, together with the costs of his successful appeal.

This section 75 is the same as section 882 of the Criminal Code, but I have not been referred to any decision on that latter section, and have, at the limited time at my disposal, been unable to find one, if it exists. All objections, however, to legal proceedings must, it seems to me, be either to substance or to form. Here the objection is not a matter of form, so it must be one of substance: there can be no more substantial objection to a conviction than the ground that the by-law on which that conviction is based is *ultra vires*. The case of *Regina* v. *Cavanagh*, 27 U.C.C.P. 537, seems to contemplate that under a statute not so strong as this, the appellant might be precluded from raising objections in the manner sought to be done here. In *Rodgers* v. *Richards* (1892), 1 Q.B. 555, the inclusion of two offences in one information was held to be a "defect in substance" under the Summary Jurisdiction Act, 1848; see also *Regina* v. *Hazen*, 20 Ont. App. 633. As to waiving objections generally by appearing and pleading, see *Regina* v. *Vrooman*, 3 Man. R. 509; and that the objection of *res judicata* cannot be urged upon *certiorari* if not taken before the Magistrate, see *Re Bibby*, 6 Man. R. 472, and the same rule has been stated to apply even to an objection to the jurisdiction. *Regina* v. *Starkey*, 7 Man. R. 489.

It is urged by appellant's counsel that it will work a hardship on his client if he is not permitted on the appeal to raise the point as to the invalidity of the by-law, owing to his neglecting to raise it before the Magistrate, where he was not represented by counsel. However desirable it might be to settle now the question of the validity of the by-law, and whatever my own inclination might be, my duty is plain, and it is, that in cases like the present, where I am not given any discretion, I have to decide the question not by inclination, but by statute. It follows, then, that the appellant is on this appeal precluded by said section 75 from raising the question of the validity of the by-law.

On application I shall fix a day for the hearing of any further points of the appeal.

VICTORIA, B.C., October 28, 1898.

MARTIN, J.—

On the appeal coming on this day for further hearing, Mr. Bradburn applied to have the case re-opened, and witnesses called as to the merits. Mr. Higgins, for the respondent, contended that the appellant having pleaded guilty, there were no merits to dispose of.

To open up the matter at this stage would be tantamount to allowing the defendant to withdraw his plea of "guilty" after he was convicted on that plea. This I have no power to do. The appeal came before the Court on admission, so to speak, and the effect of the proposed course would be to introduce in the appeal a conflict of facts where none existed before.

It was then urged that I should inquire into the amount of the fine imposed, which was the limit allowed by the by-law. It is admitted that I have no power to review the discretion of the Magistrate in ordinary cases, but it is suggested here that the Magistrate acted improperly, or irregularly, in the way in which he asked questions of the prosecutor and others regarding the existence of malice in the defendant's mind, so as to arrive at the extent of the fine

he thought fit to impose. After hearing counsel at considerable length, I cannot see that the Magistrate prevented the defendant from rebutting the inference of malice, or otherwise acted oppressively, and though the fine imposed may be greater than I would have imposed if I had been dealing with the matter, still that is not sufficient to warrant me in interfering with the Magistrate's exercise of the discretion conferred upon him.

Appeal dismissed with costs.

Note: *Waiver in Criminal Cases.*

By appearing and pleading to the charge and making his defence thereto the accused waives any objection to the want of previous notice or summons. *Rex* v. *Aikin*, 3 Burr. 1785; *Turner* v. *Postmaster-General*, 34 L.J.M.C. 10; *R.* v. *Shaw*, 11 Jur. N.S. 415. But where a defendant who had received no previous notice of the hearing of a charge against him, but was present before the magistrates waiting to be called as a witness in a charge against another party, asked time to prepare his defence, and to procure counsel, and did not plead to the charge, or interpose in any other way than by asking for the allowance of his rights, such cannot be taken as a waiver of the want of notice, nor as giving to the justices the jurisdiction they otherwise would not have, to take up unexpectedly a charge against a person whom they chance to find in their presence. *R.* v. *Vrooman* (1886) 3 Man. R. 509, 513 (Killam, J.) Where a defendant on an application for an affiliation order intends to object to the jurisdiction of the justices on the ground that a prior application had been made against him, and had been dismissed for want of corroborative evidence, and that such dismissal was a dismissal on the merits, the objection ought to be taken before the justices on the hearing of the second application, and if the defendant fails to take the objection, and raises a defence on the merits the court will not grant a certiorari to quash the order made against him. *R.* v. *Herrington* (1864) 12 W. R. 420. (Cockburn C.J., Blackburn, J. and Mellor, J.); and where at the hearing of a summons for refusal to pay a parish rate under a statute, which pro-

Note—*Continued.*

vided that if the validity of the rate be disputed, and notice given by the party disputing to the justices, the latter should forbear giving judgment thereon, the person summoned cross-examined witnesses and argued the case before the justices and made no objection to their jurisdiction till they had decided against him, the court exercised its discretion by refusing an application for certiorari asked for on the ground that the order was made without jurisdiction. *R.* v. *Justices of Salop* (1859), 2 Ellis and Ellis 386. So also if the defendant relies on the question being *res judicata,* the objection should be taken before the magistrate; *Re Bibby* (1890) 6 Man. R. 472; and an objection to the inclusion of two offences in the one information contrary to Cr. Code 845, must likewise be made before the magistrate. *R.* v. *Hasen*, 20 Ont. App. 633.

An objection that the prosecution could legally be brought only before two justices, and that one justice had no jurisdiction, must be taken by the defendant at the hearing, or it will be waived. *R.* v. *Starkey* (1891) 7 Man. R. 489, 496.

Where a warrant was issued informally and without oath, and the defendant having no knowledge of the defect made no objection to the hearing of the charge, it was held that the conviction was right. *R.* v. *Hughes*, 4 Q.B.D. 614; *Dixon* v. *Wells*, 25 Q.B.D. 249.

A defendant who has been summoned from without the jurisdiction of the justices for an offence which has taken place also out of their jurisdiction does not, by his appearance on the summons, cure the defect of want of jurisdiction. *Johnson* v. *Colam*, L.R. 10 Q.B. 544; Paley Sum. Convictions, 7th ed., 109.

And it is a matter of public policy that no proceedings which by the statute 29 Car. 2, c. 7, s. 6, are prohibited from being taken on a Sunday, can be made good by any assent or waiver by the party illegally arrested. *Taylor* v. *Phillips*, 3 East 155.

But it has been held in Ontario that if, after a commitment for trial made on a statutory holiday, the accused elects

Note—*Continued.*

to be tried at the County Judge's Criminal Court, and there pleads to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment. *R.* v. *Murray* (1897) 1 Can. C.C. 452.

It is competent for the parties to waive an objection that the magistrate is disqualified on the ground of interest. *Wakefield* v. *West Riding Ry. Co.*, L.R. 1 Q.B. 84; but the objection is not waived by reason of its not having been taken at the hearing, unless the party objecting was then aware of the disqualifying interest. *R.* v. *Sheriff of Warwickshire*, 24 Eng. L.T. 211; *Lancaster Ry.* v. *Heaton*, 8 El. & Bl. 952; *R.* v. *Cambridge*, 27 L.J.M.C. 160; *R.* v. *Aberdare Canal Co.*, 14 Q.B. 854.

An objection to a trial because of improper comment by the prosecuting counsel before the jury upon the failure of the prisoner's wife to testify, which comment is prohibited by the Canada Evidence Act, sec. 4 (2), is not waived because not taken at the time of the comment, nor until after the jury had retired to deliberate. *R.* v. *Corby* (1898) 1 Can. C. C. 457, and Note, vol. 1, p. 466.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FERGUSON, ROBERTSON AND MEREDITH, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. EDWARDS.

Rape—Verdict of guilty of Common Assault—Limitation of time for Information on charge of Assault—Cr. Code, 265, 267, 713, 840, 841, 842, 864.

1. Cr. Code sec. 841, limiting the time within which an information can be laid "in the case of any offence punishable on summary conviction," applies only to proceedings under the summary conviction clauses of the Criminal Code.
2. An information may be laid and proceedings taken thereon for the prosecution by indictment of an indictable offence, although the case is one which might have been summarily tried by a justice had the information been laid within the six months' limit provided by Cr. Code sec. 841, and although that period had expired before the laying of the information.
3. An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed.

ARGUED: May 2, 1898.

DECIDED: May 6, 1898.

The prisoner Frederick Edwards, was tried for rape at the court of Oyer and Terminer for the County of York, on January 19th, 1898, before Rose, J., and a jury.

The act was charged as having been committed in the month of February, 1897, and the information was laid on November 11th, 1897.

The jury acquitted the prisoner of rape, but found him guilty of common assault.

A reserved case was granted at the request of the prisoner as to the application of section 841 of the Code.

Faulds, for the prisoner. The prisoner was acquitted of the offence charged and must go free. He cannot be convicted of common assault as that was punishable on summary conviction and the complaint or information was not

laid within six months of the offence: Criminal Code, sections 840 and 841. Otherwise section 841 could be evaded by charging a more serious offence and obtaining a conviction for a lesser. I refer to *Queen* v. *West* (1898) 1 Q. B. 174.

J. R. Cartwright, Q.C., Deputy Attorney-General, for the Crown. This offence was not punishable on summary conviction, as it was not taken up or proceeded with in that way. There was no obligation to proceed summarily, the prosecution could be by indictment: Criminal Code, sec. 265. Summary trial depends upon the consent of both parties: section 864. Section 841 applies to cases where the magistrate has the absolute right to deal with the charge—here he should abstain: section 864, sub-section 2. Assault is included in the charge of rape and the conviction is proper and should be sustained: section 713.

Faulds, in reply.

TORONTO, May 6, 1898.

FERGUSON, J.—

The indictment was for rape. The act was charged as having been committed in the month of February, 1897. The information was laid on the 11th day of November, 1897. The indictment was found on the 12th day of January, 1898. The jury acquitted the prisoner on the charge of rape, but found him guilty of a common assault. It was objected that there could be no conviction for common assault, as the complaint was not made nor the information laid within six months from the time when the matter of complaint or information arose, the provisions of section 841 of the Criminal Code being invoked. The question is whether or not this section 841 applies to the case.

This section is contained in part LVIII. of the Code. Section 840 in the same part of the Code says, amongst other things: "Subject to any special provisions otherwise enacted with respect to such offence, act, or matter, this part shall apply to every case in which any person commits, or is suspected of having committed, any offence over which the

Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment."

Section 841, amongst other things, enacts: "In the case of any offence punishable on summary conviction if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid within six months from the time when the matter of complaint or information arose."

Under the provisions of section 864 whenever any person unlawfully assaults or beats any other person, any justice may summarily hear and determine the charge, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto. Or if such justice is of opinion that the assault or battery complained of is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same.

By section 265. Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or two months' imprisonment with or without hard labour.

This section 841 was originally section 5 of 52 Vict. ch. 45 (Can.), an Act to amend the Summary Convictions Act, and it seems plain to me that its provisions apply only to cases arising, and in which proceedings are had, under the provisions regarding summary convictions.

The indictment being for rape (and in the form found in Archbold's Criminal Pleading and Evidence) and it being assumed that the information or complaint was one charging the same offence, there can, I think, be no pretence that the offence charged was an offence "punishable on summary conviction" or one that could be properly tried under the provisions of the Summary Convictions Act or the analagous

provisions now contained in the Code; and besides, these provisions were not invoked or proceedings taken or sought to be taken under them.

The case seems to me the ordinary case of an indictment for rape, in which on the trial the jury under the provisions of section 713 found the defendant not guilty of the rape charged, but found him guilty of the lesser offence included in the indictment and proved: and I am of the opinion that section 841 has no application whatever to the case.

ROBERTSON, J.—

I concur in the judgment of my brother Ferguson just delivered.

MEREDITH, J.—

The codification of the criminal laws and the practice in criminal cases in Canada has given cause or excuse for the argument of this case.

If the matter stood as before the Code, there could hardly be a doubt about it.

The section relied upon was section 11 of the Summary Convictions Act, [R. S. C. ch. 178] as amended by 52 Vict. (Can.) ch. 45, sec. 5—a provision similar to thatcontained in the Imperial Act, and one which has been in force here and in England for a good many years.

Its purpose and effect were to limit the time within which proceedings under the Summary Convictions Act might be taken, and had no relation whatever to proceedings in respect of indictable offences.

The Summary Convictions Act has now become part LXVIII. of the Criminal Code, 1892. The amendment of section 11 merely extended the time limit generally from three to six months; and that section as so amended, is now section 841, in part LVIII. of the Code, with the words "in the case of any offence punishable on summary conviction" added, and the exception as to part of the county of Saguenay omitted.

But these changes did not alter the purpose or the effect of the section. They cannot be considered to have changed the well known law, that in respect of the offence of which the prisoner was convicted there was no limit to the time within which the prosecution must be commenced, except as to proceedings under the Summary Convictions Act.

The purpose was not to absolve from crime, but was to limit the time within which the accused might be tried and punished, deprived of the right of trial by jury.

The wording of section 841 might have been made plainer, as the section of the Imperial Act is; but to those familiar with the practice in criminal cases before the Code, that could hardly have raised a doubt; and to those who were not, and had doubt, the next following section of the Code, 842, ought to have removed it, for it is just as general in its words, and yet it is obvious that the words "every complaint or information" mean a complaint or information under the Summary Convictions clauses: and the same words in the two sections must have the same meaning; there is no reason whatever for giving them one meaning in one section, and another and very different meaning in the other.

It was not extraordinary that Parliament, in conferring summary power to convict in minor criminal matters, should provide a limitation of time within which such exceptional proceeding must be taken; and the less so in a case like this, where the punishment provided for on summary conviction differs from that provided for on conviction in the ordinary way upon indictment and trial by jury.

And again there might be a prosecution for the offence in question without any information or complaint at all, for instance, by indictment without any preliminary proceeding in the usual manner; and so the section could not, even if its effect were that contended for in the prisoner's behalf, bar a trial and punishment for the crime.

On the broad ground, that the time limit invoked applies only to proceedings for the purpose of summary conviction, I am of opinion that the ruling at the trial, upon the one question reserved, was in effect right and should be affirmed.

Judgment affirming conviction.

Note: *Rape—Lesser offence of assault included—Limitation of time for summary proceedings for assault.*

In the case of *The Queen* v. *West* (1898), 1 Q.B. 174, the circumstances were as follows: By sec. 5 of the Imperial Criminal Law Amendment Act, 1885, it is a misdemeanor to unlawfully and carnally know a girl between the ages of thirteen and sixteen, and in it there is a proviso that no prosecution for that offence shall be commenced more than three months after the commission of the offence. By sec. 9 of the same Act, on the trial of an indictment for rape, the defendant may, if the jury think the facts warrant it, be acquitted of that charge and convicted of an offence under sec. 5. The defendant was committed for trial for rape, the offence having been committed *less* than three months before his committal for trial. On his trial, which took place more than three months after the commission of the offence, he was indicted only for an offence under sec. 5, as it appeared on the depositions that if was not a case of rape, as the evidence indicated consent on the part of the person against whom the offence was committed. The defendant was convicted, and on a case reserved, it was held by Lord Russell of Killowen, C.J., that the prosecution for the offence of which the prisoner was convicted was commenced within three months after the commission of the offence, because "a prosecution for rape is in fact and in substance a prosecution for any offence of which, on an indictment for rape, the prisoner could have been found guilty"; and that the maxim "Omne majus continet in se minus" applied. Hawkins, Mathew, Grantham and Darling, JJ., concurred.

An indictment may now be laid under Cr. Code secs. 626, 713, charging rape and also assault with intent to commit rape. Taschereau's Cr. Code (1893) p. 273.

Rape—Form of indictment.

The following form of indictment for rape is given in Archbold's Criminal Pleading and Evidence, 21st ed. (1893) page 810:—

"—— court, to wit:—The jurors of our lady the Queen

Note—*Continued.*[1]

upon their oath present that J. S. on the —— day of —— in the year of our Lord 18—, in and upon A. N., violently and feloniously did make an assault, and her, the said A. N. then violently and against her will feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity."

The following form is given by Mr. Crankshaw in his work on the Criminal Code of Canada (p. 257.)

"In the (*name of the court in which the indictment is found.*) The jurors for our lady the Queen, present that on —— at ——, A. in and upon B., a woman who was not his wife, did unlawfully make an assault and did then and there unlawfully ravish and have carnal knowledge of her the said B., without her consent. [Or A. did unlawfully have carnal knowledge of B., a woman who was not his wife, with consent then and there by him, the said A. obtained from the said B. unlawfully, and by threats; (*or*, unlawfully and by personating the husband of the said B., *or* unlawfully and by false and fraudulent representations as to the nature and the quality of the act.)]

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE, J., GRAHAM, E.J., MEAGHER AND HENRY, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. HARTY.

Obtaining goods by false pretences—Evidence—Continuing pretence necessary until delivery — "Owner" of vessel—Presumption—Cr. Code 359.

1. To prove a charge of obtaining goods by false pretences where there is a lapse of time between the making of the pretence and the delivery of the goods, there must be a direct connection between them constituting the former a continuing pretence up to the time of delivery.
2. The word "owner" following the signature of the accused in a letter written by him inviting negotiations for the charter of a vessel in his possession and managed by him, does not in itself constitute a representation by the accused that he is the "registered owner."

ARGUED : March 9, 1898.

DECIDED : March 26, 1898.

Defendant was committed for trial at Annapolis, in the County of Annapolis on a charge of having unlawfully and by false pretences, obtained from George E. Corbitt, certain goods, merchandise and money of the value of $70.76, with intent to defraud, &c. The false pretence complained of was a representation that defendant was owner of a vessel, by which representation plaintiff was induced to supply certain goods, whereas the owner of the vessel at the time was Ella A. Harty, the defendant's wife.

The defendant having been convicted of the offence charged, Savary, C.C.J., before whom the trial took place, stated the following case for the opinion of the court.

1. Whether under the Married Woman's Property Act of 1884, and the Merchant Shipping Act of 1894, the transfer of the vessel to the wife of the prisoner conveyed to her the title to the vessel, so, or in such a sense, that the prisoner was guilty of a false pretence in representing himself to be the owner of the vessel in order to obtain credit.

2. Is there any evidence to support the conviction herein?

J. M. Davison, for the prisoner.—The representation that accused was the owner was true. There was a direct transfer from the husband to the wife, which under the Married Woman's Property Act would not give her a title. (Meagher, J. — Under a judgment against the husband you could not get possession of the vessel without setting aside the conveyance to the wife.) In order to commit this offence there must be a false statement. (Henry, J.—The conveyance was good as between the parties. Ritchie, J.—Could the husband have got the property back?) If the representation was not true there is no evidence that accused knew that it was false. There being no provision respecting married women in the Merchant Shipping Act, the Married Woman's Property Act applies.

J. W. Longley, Attorney-General, for the Crown.—When accused represented that he was the owner, he represented that the vessel was liable to execution in an action against him. When the transfer to his wife was registered, she became the absolute owner, independent altogether of the Married Woman's Property Act. The Legislature of Nova Scotia can pass an Act respecting the ownership of vessels within the province, not inconsistent with the Merchant Shipping Act. Even if by process of law the husband could get the title back into himself, there would still be a fraudulent representation.

J. M. Davison, in reply.—At common law the wife was incapable of holding personal property. The Merchant Shipping Act not conferring that power on a married woman, the common law is still in force.

HALIFAX, March 26, 1898.

GRAHAM, E.J.—

The provisions of the Code in respect to obtaining property by false pretences are in their phraseology different from the previous enactment.

By s. 359, everyone is guilty, &c., who, with intent to defraud by any false pretence, either (1), directly obtains anything capable of being stolen, or (2), through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or (3), procures anything capable of being stolen to be delivered to any other person than himself.

Now the statement of the offence in this case is :—

"For that he, the said John B. Harty, at Annapolis Royal, in the County of Annapolis, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, unlawfully, and by false pretences, did obtain from one George E. Corbitt, certain goods, and merchandise, and money of the value of $70.66, with intent to defraud, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity."

This, except that it does not set out the false pretence, would be the form under one of the old provisions. R.S.C., c. 164, s. 77, viz. :—

"Everyone who by any false pretence obtains from any other person any chattel, money or valuable security with intent to defraud, is guilty of a misdemeanor and is liable to three years imprisonment."

Or it would be sufficient, except that it does not set out the false pretence under the first case contemplated by the 359th sec. of the Code, namely, the case of a person who "with intent to defraud by any false pretence directly.... obtains anything capable of being stolen."

But it does not cover either of the other two cases mentioned in that section. I assume that it followed the warrant, at any rate that is what the prisoner was tried for. *Reg.* v. *Inglis*, 25 N.S.R. 259.

The learned judge has reserved a case. He says :—"I find the prisoner guilty as charged in the statement of offence." And he reserves two points as set out in the case submitted.

Besides he has given leave to move for a new trial on the ground that the verdict is against the weight of evidence.

The schooner Chlorus was registered under the Merchant Shipping Act, in the name of the defendant's wife, having been transferred from the husband to a third person, and by him to the wife, on the second of April, 1895. (I do not think that the object of that transfer is irrelevant in this prosecution). Under the Married Woman's Property Act, the vessel remained clearly liable to be taken in execution at the suit of the defendant's creditors.

The vessel remained in possession of and was managed by the defendant.

On the 17th June, 1895, the defendant addressed to the prosecutor the following letter about a coal charter :—

" DEAR SIRS,—The Chlorus will arrive to you now in a few days. Can you charter her for coal from Glace Bay or Cow Bay? We cannot afford to take charter from Old Sydney, as they have kept the vessel there some 16 days. Please reply. Coal to Yarmouth is $1.25, and some of the vessels have had $1.20 of late. Let me know what you will pay to Annapolis by return mail and oblige.

(Sgd.) J. B. HARTY, *Owner.*"

That was the 17th June, and it is as I said about a coal charter, and only that, and the use of " owner " at the end is clearly attributable to the necessity of distinguishing between owner and master, but that, it appears, is relied on as the pretence.

Then, the prosecutor says :—

" Three or four months afterwards, he came up to my office with Captain McKinnon, and said he wanted apples enough to load his vessel. Would give $1.75 to $2 a barrel for them, and I said I thought they could be bought for less, apples being plentiful. He said several parties had been to him wanting him to ship on freight, and in a few days some parties came, and I said they had better take their apples to the vessel, and if Harty took them I would pay for them, so as each party brought his orders or receipt I paid them. After getting letter of 17th June, I supplied him with these goods, in consequence of his representations that he was the

owner of the vessel. Certainly I would not have given him the credit if he had not represented himself as owner."

I think with deference that this last sentence, if not the two last sentences were inadmissible as evidence. The last sentence cannot be considered as the statement of a fact. It is much more objectionable than the question asked in *The Queen* v. *King* (1896) 1 Q.B. 215.

The goods obtained here, provisions and supplies for the vessel, were not ordered until the 9th October, 1895, after intervening voyages, and the cash was advanced by the prosecutor in payment of apples supplied by the owners as cargo for the vessel on an order of the defendant. The account is against schooner Chlorus and owners. The only order for cash in evidence is as follows :—

"Received from W. H. Hardwick twenty barrels of apples. Sch. Chlorus,

(Sgd.) J. B. HARTY, *Owner.*

Annapolis, N.S., Oct. 14th, '95."

That the defendant gave these orders signed in that way to the apple men, in order to induce Corbitt to let him have the goods or the money on credit seems to me to be very far fetched.

The prosecutor says in cross-examination :—

"My first dealings were in October. I think once or twice when he was running in the coal trade I supplied the vessel. I had her running in the coal trade. Capt. John McKinnon was captain. This letter A. W. S/1, refers to a totally distinct transaction. It does not refer to the goods in this bill, nor to any particular transaction.... It was solely by reason of the shipping orders I paid for the apples. I would not have paid for them without an order from Harty. This A.W.S/3, has no reference to this matter. I did not act solely on the faith of that letter, but partially. The personal agreement was that he was to remit me the money as soon as he arrived at Sydney. The letter A.W.S/1, does not refer to the supply of these goods, but from that time on I believed him to be the owner of the vessel."

On the 4th of January, 1896, this letter was written :—

"DEAR SIR,—No doubt you may think it strange you have not received the sch. Chlorus' account, and, no doubt, an explanation would be proper. The whole fact is that the long trip eat up the whole thing, and there was nothing for me to send you ; at any rate, we will bring coal to you in the early spring, and then load brick, and in that way be able to settle honorably with all the people. We will make a couple of short trips before April, so as to be at Annapolis as early as we can. Yours respectfully,

(Sgd.) JOHN B. HARTY.

The defendant in his evidence shows that before the prosecution was instituted, the prosecutor had sued the wife for the account.

Then he came to him armed with a warrant, and demanded a settlement of the account, which the defendant tried to accomplish, but he failed to procure the money.

His evidence satisfactorily shows that the failure to pay this account arose from a losing voyage which left him without means.

In my opinion, there is no evidence to support the conviction. In the first case sent up by the learned judge, the reasoning upon which the judgment is supported showed that he was convicting the defendant as to the goods under the second provision of s. 359, that is, of obtaining, &c., through the medium of a contract obtained by false pretence. And, as to the money, under the 3rd provision, that is, procuring it to be delivered to a third person. He finds that :—

"George E. Corbitt was, by this false pretence, induced through the medium of a contract to part with the goods in question, and the prisoner obtained them through the medium of a contract to deliver them on board the vessel."

He also finds that :—

"The prisoner procured money to be paid and delivered to third parties, being the parties who sold apples to the defendant on board the Chlorus and who were paid by Corbitt for such apples at the prisoner's request."

I pass by the question of finding the prisoner guilty of two distinct offences, one in respect to goods and one for money, aimed at by two distinct provisions of a section, with a statement only framed in respect to one charge.

Neither of these cases against the defendant is embraced in the charge. And, if they had been, the evidence would hardly, in my opinion, although it is for the jury, have justified a conviction. The pretence is too remote from the contract and credit which was obtained. On the other hand, the charge which is made of directly obtaining the goods and cash in this case, by the false pretence, has no evidence to support it. It was a contract or credit which was obtained, and the money which was paid out to the apple men was not an obtaining by this defendant.

Of course there are English cases on the statute similar to the previous Act, which show that, notwithstanding an intervening contract, there may be a conviction of directly obtaining the article. The contract would not necessarily afford an intervening element between the pretence and the obtaining of the article; it would be for the jury to draw the inference that there was a direct connection. There might be a false representation made pending or as part of the contract by which the article is obtained.

Here, three or four months before the obtaining of the goods or money, the defendant styled himself owner in a letter asking for a charter. If there must be a sinister motive imputed, why is it not as reasonable to say it was to get the charter?

In *Regina* v. *Stone*, 1 F. & F. 311, a false certificate was obtained by the defendant from the surveyor that he had completed two houses, which entitled him to receive, and he did receive, £30 from the building society of which he was a member. But, as the object of the false pretence might have been to avoid a forfeiture of the houses under the rules in case they were not completed by the time specified, the counsel thought the charge not sustainable, and Willes, J., assented. The head note is:—

"On an indictment for obtaining money by false pretences,

if it is consistent with the evidence for the prosecution that the object of the false pretence was something else than the obtaining of the money, the charge will not be sustainable."

But take both the letter and the order, the pretence was that he was the owner of the vessel. The most that can be said about it was that it was a pretence to procure credit generally, in other words to procure a contract, not the things which were obtained in the ordinary course for the vessel and in connection with her cargo.

In *The Queen* v. *Martin*, L.R. 1 C.C.R. 56, it was held that a conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence. Whether or not there is such a direct connection is a question for a jury. But during the course of the argument Lush, J., said :—

"In *Gardner's* case the prisoner did not contemplate obtaining the food when he made the false pretence."

And Burrill, C.J., in the judgment said :—

"What is the test? Surely this, that there must be a direct connection between the pretence and the delivery—that there must be a continuing pretence. Whether there is such a connection or not is a question for the jury. In *Gardner's* case, 1 D. & B. 40, the prisoner obtained at first lodgings only, and after he had occupied the lodgings more than a week, he obtained board, and it was held that the false pretence was exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made."

Then he refers to *Reg.* v. *Bryan*, 2 F. & F. 567.

The case of *Reg.* v. *Bryan*, 2 F. & F. 567, followed *Reg.* v. *Gardner*, 7 Cox C.C. 136. In the former it was held that where a contract was entered into by reason of false representations, and goods or money obtained under the contract, it is too remote to charge the obtaining of the goods or money by the false pretences. It is said that these two cases are in conflict with others, and I do not rely upon them.

The English draft of a criminal code, no doubt in consequence of the conflict in the decisions, first contained a provision dealing with the case of a contract obtained by false pretences by which goods were obtained. That has been incorporated into the Criminal Code of Canada. And we have now two distinct things, namely, by a false pretence obtaining goods directly, and, through the medium of a contract. The learned judge has only found the latter.

In my opinion, the evidence is not sufficient to convict the defendant of directly obtaining the goods or money by means of the false pretence. And as to procuring the money to be delivered to third persons, there is no charge in the statement to cover that offence.

I do not propose to deal with the other question reserved as to registry in the name of the wife. Practically the husband was the owner of the vessel.

I think that it is carrying the matter far to suppose that "owner" meant registered owner. It is an expression that has no definite meaning in law, and is applicable to various interests, which a person may have in an article. *Hopkins* v. *Provincial Ins. Co.*, 18 U.C.C.P., 74; *Lister* v. *Lobley*, 7 A. & E. 124, (Denman, C.J., and Littledale, J.).

The conviction must be quashed.

McDONALD C.J., and HENRY, J., concurred.

RITCHIE, J. (dissenting)—

The questions reserved for the consideration of this court are :—

1. Whether under the Married Woman's Property Act of 1884, and the Merchant Shipping Act of 1894, the transfer of the vessel to the wife of the prisoner conveyed to her the title to the vessel, so, or in such a sense, that the prisoner was guilty of a false pretence in representing himself to be the owner of the vessel in order to obtain credit.

The only person recognized by the Merchant Shipping Act as being the owner of the vessel, is the person known as the registered owner. I can find nothing in that Act to

prevent a married woman from being a registered owner if she is in other respects qualified. It is clear that a female can be a registered owner and there is a provision in the Act that if by her marriage her interest in the vessel is transmitted to her husband, he can by adducing evidence of her marriage and making a declaration, become the registered owner in the place of his wife. But if he does not do this, his wife remains the registered owner, and there is nothing in the Act to affect or curtail her rights on account of her marriage; but they remain the same as those of any other registered owner. Besides this, there are many instances now in which, on account of the different married woman's property Acts, the marriage does not transmit a woman's property to her husband or affect her interest therein in any way. In such cases the vessel would still remain the property of the woman notwithstanding her marriage, and she would occupy the same position as if the vessel had been conveyed to her after her marriage.

In this case the vessel was conveyed by John McKinnon to the prisoner's wife, at the instance of the prisoner; and, in my opinion, it remains her property and subject entirely to her control, at all events until the husband takes steps, under the Act, to have the vessel registered in his name, if he can show himself entitled thereto by virtue of his marriage. The prisoner's counsel contended that this vessel did not become the separate property of the wife, inasmuch as she got it from her husband, and it did not come under the operation of the Married Woman's Act in force here, but he, as her husband, became by the common law the owner of her personal chattels.

I am not prepared, from the evidence before us, to assent to the proposition that this vessel was acquired from the husband, or that he could, by making a declaration and proving the marriage, require the Registrar of shipping to recognize and register him as the owner. At all events, this has not been done, and until it is effected, neither the prisoner nor his judgment creditors can, in my opinion, interfere with the vessel against the will of the registered owner.

I think the prisoner was guilty of a false pretence in representing himself to be the owner of the vessel in order to obtain credit.

2. The second question is:—Is there any evidence to support the conviction herein?

I think it clear that there was evidence to support the conviction.

In addition to the case reserved, the counsel for the prisoner produced the leave of the learned trial judge to make an application to this court for a new trial on the ground that the verdict was against the weight of evidence. He did not, however, argue this point or attempt to show that it was so, and after reading the evidence, I am unable to come to that conclusion.

MEAGHER, J. (dissenting)—

There is, in my opinion, sufficient evidence to uphold the conviction.

There was some evidence on which, coupled with the circumstances, the judge might have found as he did, and especially so, inasmuch as the accused did not meet in any way the evidence which tended to show guilt.

The appeal, or rather the motion for leave to appeal, on the weight of evidence was not argued.

I do not agree that it is open to us under the case reserved to consider the question whether or not there are two offences in the charge upon which the accused was tried.

No question was reserved or raised, as to the admissibility or weight of evidence, and therefore, I think we ought not to deal with the case in either aspect.

Conviction quashed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROSE, J., IN CHAMBERS.

THE QUEEN v. McINTOSH.

Frauds against cheese factories—Appeal from summary conviction—Scale of costs of appeal—Discretion—Cr. Code 879, 880—52 Vict. (Can.) c. 43, s. 9.

1. All the provisions of Cr. Code secs. 879-880 are to be taken as embodied in the Act as to frauds against cheese factories, except as varied by or inconsistent with the latter Act, and confer the power to award costs on an appeal taken under section 9 thereof.
2. The costs which may be allowed on an appeal under section 9 of the Act as to frauds against cheese factories are in the discretion of the judge apart from the tariffs of costs applicable to other proceedings as to which he has jurisdiction; and when such an appeal is taken to a County Court judge, his allowance of costs according to the County Court tariff should not be interfered with.

ARGUED: April 25, 1897.

DECIDED: September 23, 1897.

Motion by defendant, Donald J. McIntosh, for a writ of prohibition to the County Judge of the county of Middlesex, the clerk of the peace of that county, and a private prosecutor, to restrain them from proceeding to enforce an order dismissing with costs an appeal under 52 Vict. (Can.), ch. 43, sec. 9, an Act to provide against frauds in the supplying of milk to cheese, butter and condensed milk factories, against a conviction of the applicant under the above Act before two justices of the peace, of sending deteriorated milk to a cheese factory.

The section referred to is as follows:—

9. No appeal shall lie from any conviction under this Act except to a judge of a superior, county, circuit, or district court, or to the chairman or judge of the court of the sessions of the peace, having jurisdiction where the conviction was had; and such appeal shall be brought, notice of appeal in writing given, recognizance entered into or deposit made, within ten days after the date of conviction, and shall be

heard, tried, adjudicated upon and decided without the intervention of a jury, at such time and place as the court or judge hearing the same appoints, within thirty days from the date of conviction, unless the said court or judge extends the time for hearing and decision beyond such thirty days; and in all other respects not provided for in this Act the procedure under "The Summary Convictions Act," so far as applicable, shall apply.

From this conviction he appealed to the County Judge, who dismissed the appeal with costs after holding that the conviction was made under 52 Vict. (Can.), ch. 43, and that, therefore, there was the right of appeal.

After judgment was given it was contended before the County Judge, on the question of costs, (1) that there was no power under sec. 9 of 52 Vict. (Can.), ch. 43, to award costs; (2) that if there was such power they must be confined to disbursements, and (3) if solicitor's fees were to be allowed they must be limited to the tariff of fees adopted by the General Sessions of Middlesex.

The Judge referred the bill of costs to the clerk of the County Court, who taxed it according to the County Court tariff, and upon the receipt of his report the Judge reconsidered the taxation, made some alterations, and finally fixed the costs at the sum of $66.89 in his final order upon the appeal.

Sections 879 and 880 of the Criminal Code, 1892, provide as follows:—

879. Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant as well as the defendant, may appeal, in the Province of Ontario, to the Court of General Sessions of the Peace; in the Province of Quebec, to the Court of Queen's Bench, Crown side; in the Provinces of Nova Scotia, New Brunswick and Manitoba, to the County Court of the district or county where the cause of the information or complaint

arose; in the Province of Prince Edward Island, to the Supreme Court; in the Province of British Columbia, to the County or District Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose; and in the North-West Territories to a judge of the Supreme Court of the said territories, sitting without a jury, at the place where the cause of the information or complaint arose, or the nearest place thereto where a court is appointed to be held.

880. Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say :—

(a) If the conviction or order is made more than fourteen days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order is made within fourteen days of the sittings of such court, then to the second sittings next after such conviction or order.

(b) The appellant shall give to the respondent, or to the justice who tried the case for him, a notice in writing, in the form NNN in schedule one to this Act, of such appeal, within ten days after such conviction or order;

(c) The appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall enter into a recognizance in the form OOO in the said schedule with two sufficient sureties, before a justice, conditioned personally to appear at the said court, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or, if the appeal is against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the appellant (although the order directs imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, may deposit with the justice convicting or making the order such sum of money as such justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the *costs of the*

appeal; and upon such recognizance being given, or such deposit being made, the justice before whom such recognizance is entered into, or deposit made, shall liberate such person, if in custody;

(d) In case of an appeal from the order of a justice, pursuant to section five hundred and seventy-one, for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the next sittings of the court and to pay such costs as are awarded against him;

(e) The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party including costs of the court below, as seems meet to the court,—and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order, and to pay *such costs as are awarded,*—and shall, if necessary issue process for enforcing the judgment of the court; and whenever, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever, after any such deposit, the conviction or order is quashed, the court shall order the money to be repaid to the appellant;

(f) The said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

(g) Whenever any conviction or order is quashed on appeal, as aforesaid, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is

made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed.

Aylesworth, Q.C., for the motion, contended that there was no jurisdiction under sec. 9 of 52 Vict. (Can.), ch. 43, to award costs, as the Summary Convictions Act was only to be applied as far as "procedure" was concerned, citing *Regina* v. *Lennon*, 44 U.C.R. 456, and *Re Burnham*, 16 Ont. Pr. 390.

Shepley, Q.C., contra: It is immaterial whether the power to award costs is "procedure" or not, as sections 879 and 880 of the Cr. Code apply unless there is a provision to the contrary in the special Act. The power to award costs is not incident to the Sessions, nor does it exist at common law, and costs can only be awarded by virtue of the statute under which the justices are sitting. By the practice at many sessions forty shillings costs are allowed to the successful party: Dickenson's Guide to the Quarter Sessions, 658; *Ex p. Holloway*, 1 Dowl. P.C. 26; Archbold, Q.S. Prac., 4th ed., 160.

Under the Criminal Code an appellant is required to give a recognizance, conditioned *inter alia*, "to pay such costs as are awarded by the Court": sec. 880, sub-sec. (*c*); and the Court is empowered to "determine the matter of appeal and make such order therein with or without costs to either party, including the costs of the Court below, as seems meet to the Court: sec. 880, sub-sec. (*e*). The Court is empowered to make an order as to costs when the appeal is not duly prosecuted: sec. 884. The costs may be paid to the clerk of the peace to be paid over to the person entitled at the proper time: sec. 897.

The English statutes under which it has been held there is power to award solicitor's fees are as follows: The justices * * shall "award and order" * * "such costs and charges in the law as by the said justices in their discretion

shall be thought most reasonable and just" : 8 & 9 Wm. III., ch. 30, sec. 3. The justices may "award and order to the party for whom such appeal shall be determined reasonable costs" in the same manner as under 8 & 9 Wm. III., ch. 30: 17 Geo. II., ch. 38, sec. 4. The Court may, if it think fit, "order and direct the party or parties against whom the same (appeal) shall be decided to pay the other party or parties such costs and charges as may to the Court appear just and reasonable," such costs to be realized under the provisions of 11 and 12 Vict., ch. 43, sec. 27 : Archbold's Q.S. Prac., 4th ed., 684 ; 12 & 13 Vict., ch. 45. Costs when ordered shall be directed to be paid to the clerk of the peace. The General Sessions have power to award such sum in each case as they may think fit, and any tariff framed by the justices was a mere guide for the exercise of their judicial discretion in ascertaining the amount to be allowed."

TORONTO, September 23, 1897.

ROSE, J.—

Upon the argument I was inclined to agree with the contention of the defendant, that the language of sec. 9 of chap. 43, 52 Vict. (Can.), did not introduce the provisions of the Summary Convictions Act except with reference to the procedure upon the appeal, and gave by itself no power to award costs.

Section 879 of the Criminal Code, 1892, provides as follows : "Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice, * * any person who thinks himself aggrieved may appeal." Section 880 provides : "Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say, etc."

It seems to me, therefore, that sections 879 and 880 contain all the provisions governing this appeal save such as are found in sec. 9 of 52 Vict., ch. 43 ; *i.e.*, the provisions of section 9 are provisions of a special Act and must be read into 879 and 880.

We therefore may, I think, look to section 880 for the jurisdiction to award costs, and looking at the provisions of that section, it seems clear that the costs to be awarded are to be such as appear right in the discretion of the Court. Such sum might be awarded in gross. The discretion of the Court fixes the amount.

No reference is made to any tariff, and as none is provided, one may be adopted by the Judge to aid his discretion; but a reference to any tariff for the purpose of aiding such discretion does not, I think, introduce the tariff into the result. In other words, the Judge fixes the amount which seems to him to be reasonable. He may think, because proceedings were before him as a Judge of the County Court, that the tariff of the County Court will be a reasonable guide. He may think that some other tariff will be a reasonable guide. By whatever means he is led to his conclusion, the result must be such as in his discretion he thinks proper.

I, therefore, am unable to agree to the contention of the defendant that the costs should have been taxed and allowed by the clerk of the peace under any rules of Court. I think the clerk had no power to tax the costs, although the Judge might have had a taxation by the clerk for the purpose of assisting him in fixing an amount.

Whatever sum the clerk might have certified to him as allowable under any tariff, the Judge might adopt as reasonable or he might not. He might name a sum in excess of or less than the sum so reported to him by the clerk of the peace. As I said before, the amount to be named is to be determined in the discretion of the Judge before whom the appeal is to be had under sec. 9 of 52 Vict., and I have no jurisdiction vested in me to review his discretion, at least, as far as I am able to make out from the statutes to which I have been referred or any others which I have read.

The result is that the motion will be dismissed with costs.

Prohibition refused.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, HANINGTON, BARKER AND VANWART, JJ.

Ex Parte SONIER.

Summary proceedings—Information—Defect in—Waiver—Cr. Code 558, 559, 843, 845.

1. If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place.

ARGUED: April 15, 1896.

DECIDED: June 10, 1896.

This was an order nisi for certiorari granted by Mr. Justice Landry, in vacation, to remove a conviction made against the applicant by Walter Cahill, stipendiary magistrate of the County of Westmorland, for an offence against the second part of the Canada Temperance Act, with a view of quashing the same. Orders had also been obtained in the cases of *Ex parte Floyd*, *Ex parte McVey*, *Ex parte Robinson*, *Ex parte Poley* and *Ex parte Noiles*. Each party was convicted of two offences: 1. For keeping liquor for sale; 2. For selling liquor.

The sole ground upon which the orders were granted was that the magistrate had no jurisdiction to issue a summons, as the information had not been laid before him as required by law; the informant not being in Sackville on the day the information was laid.

The facts of the case are fully set out in the judgment.

FREDERICTON, April 15, 1896.

Jordan, Q.C., shewed cause: In all the cases but one the parties appeared and pleaded, and then an information was not necessary. The Criminal Code, 1892, s. 845, sub-s. 2; *Ex parte Orr*, 20 N.B.R. (4 P. & B.) 67. Sonier is the only one that did not appear.

D. Grant supported the rule. He cited *Dixon* v. *Wells*, 25 Q.B.D. 249; The Criminal Code, 1892, ss. 843, 559; *Regina* v. *Fletcher*, 40 L.J.M.C. 123; *Blake* v. *Beech*, 45 L.J.M.C. 111; *Regina* v. *Berry*, 28 L.J.M.C. 86; *Friel* v. *Ferguson*, 15 U.C.C.P. 584; *Ex parte Legee*, 27 N.B.R. 292.

FREDERICTON, June 10, 1896.

The following judgment was delivered in all six cases:

TUCK, C.J.—

There were six convictions before Walter Cahill, stipendiary magistrate of Sackville, for violation of the second part of the Canada Temperance Act.

Orders nisi were granted in Hilary vacation for the magistrate and prosecutor to shew cause why writs of certiorari should not issue, with a view to quashing the convictions.

The sole point in these cases is that the magistrate had no jurisdiction to issue summonses, as informations had not been laid before him as required by law.

The information in each case purports to have been laid and signed by Frank A. McCully before Walter Cahill, a stipendiary magistrate at Sackville, in the Parish of Sackville and County of Westmorland, on the 30th day of January, A.D. 1896.

The affidavit of Arthur W. Dixon, of Sackville, is to the effect that Frank A. McCully could not have been in Sackville on the said 30th of January without his, Dixon's, knowledge.

I find in the magistrate's return that Mr. McCully was called as a witness on the part of the defence. In his testimony he said: "I am the informant in this case." Question by defendant's counsel: "Did you lay and sign the information in this case on the 30th day of January last past at Sackville?" Witness objects to answer on the ground that the information speaks for itself. Question: "Were you at Sackville on the 30th day of January, 1896?" Witness objects to answer on the ground of privilege. Objection sustained.

The refusal of Mr. McCully to answer the questions convinces me that he was not at Sackville on the 30th of January last.

More than that: I think that Mr. McCully was all wrong not to answer these questions. It was his absolute duty to answer. What privilege had he? Surely not as counsel—for he appeared in Mr. Cahill's court as a public prosecutor, having been appointed inspector for the County of Westmorland. The justice should have ordered Mr. McCully to answer. But the fault was Mr. McCully's. He must have known what was right. Then, it being true that Mr. McCully was not at Sackville on the 30th of January, 1896, when and where the information is said to have been laid, is that of itself sufficient to oust the magistrate's jurisdiction? I think that it is not. Frank J. Sweeny, Esq., barrister, appeared as counsel for the defendant, and upon the information being stated to him, he replied, "not guilty." He did not enter a protest, but took objections to the proceedings. One objection was that the Canada Temperance Act is not in force in the County of Westmorland. He also cross-examined witnesses called by the prosecution, and asked for an adjournment, which was granted. When the defendant was put on defence, Mr. Sweeny called Mr. McCully as a witness.

Whether Mr. McCully was in Sackville or not on the 30th of January, at the trial the stipendiary magistrate had jurisdiction over the person and the subject matter, even if there had been no written information.

In *ex parte Orr*, 20 N.B. R., (4 P. & B.) 67, there was an application for a certiorari on the ground that no proper information had been made, and therefore the magistrate had no jurisdiction. The rule was refused. Palmer, J., said: "The magistrate had jurisdiction over the subject matter; and does not the Act take away the certiorari?" Duff, J.: "When Mr. Orr appeared before the magistrate the information would not be material. That gave him jurisdiction over the person."

This case is directly in point. *Regina* v. *McMillan*, 15 N.B. R. (2 Pugs.) 111, is much to the same effect. Allen,

C.J., in that case says: "On the day of trial the defendant, attended by her counsel, put forward this among other objections, but did not ask for any delay or adjournment of the trial. The justices proceeded with the hearing, the defendant's counsel cross-examining the witnesses, and upon clear proof of the offence charged, the justices convicted the defendant, and it does not appear that she has been in any way misled or prejudiced by the alleged defect in the information." The rule to quash the conviction was discharged.

In the *Queen* v. *Hughes*, 4 Q.B.D. 614, it was admitted that the warrant was improperly issued, and yet the conviction was upheld. This was a crown case reserved, heard before ten eminent judges. I content myself with quoting one sentence from the judgment of Lopes, J.: "I think," he says, "the warrant in this case was a mere process for the purpose of bringing the parties complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices." That is just my view as to the question at present under consideration.

Ex parte Manser, 23 N.B.R. 315, is not in conflict with other decisions. That case only decides that when a prosecution is brought before two justices under s. 105 of the Canada Temperance Act, 1878, the information must be laid before both justices. An information laid before one did not give two justices jurisdiction. I think the rules must be discharged.

HANINGTON, BARKER and VANWART, JJ., concurred.

Orders discharged.

Note: *Summary convictions—Defect or irregularity in information.*

It is not a matter within the discretion of the magistrates whether a man shall be put on his trial without any proper preliminary proceedings; and in administering justice summarily, strict regularity must be observed. *Blake* v. *Beach* (1876), L.R. 1 Ex. D. 320, 334, 335. A man is not to be

Note—*Continued.*

put at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial; if he waives the want of information and summons, and *by his own assent* is properly before the magistrates, it would be in their discretion to grant or refuse delay in order to prepare his defence. Ibid, p. 334.

It was established by the decision in *R.* v. *Hughes*, 4 Q.B.D. 614, by the full Court of Criminal Appeal that when a person is before justices who have jurisdiction to try the case, they need not inquire how he came there, but may try it. In commenting upon that decision in *Dixon* v. *Wells* (1890), 25 Q.B.D. 249, Lord Coleridge, C.J., said (p. 256):—

"I do not, however, feel able to decide in his (appellant's) favor on that point alone (*i.e.*, that objection had been taken before the magistrate), for, although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in *R.* v. *Hughes*, 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in *R.* v. *Shaw*, 34 L.J.M.C. 169, they seem to assume that if the two conditions precedent, of the *presence of the accused* and *jurisdiction over the offence*, were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in *R.* v. *Hughes*, although something like that is said in one of the cases; it is an important question well worth consideration in the Court of Appeal."

The warrant of a magistrate is only *prima facie* evidence of the fact recited therein that an information on oath and in writing had been laid. *Friel* v. *Ferguson* (1865), 15 U.C.C.P. 584.

An information should include a statement of the following particulars: (1) the day and year when exhibited, (2) the place where exhibited, (3) the name and style of the justice or justices before whom it is exhibited, and (4) the charge preferred. Pritchard's Q.S. Prac. (1875), 1058.

Note—*Continued.*

A complaint or information is essential as the foundation of summary proceedings, and without it the justice is not authorized in intermeddling, except where he is empowered by statute to convict on view. Paley on Convictions, 7th ed., 72; 1 Wms. Saunders, 262, n. 1; *R.* v. *Justices of Bucks*, 3 Q.B. 800, 807; *R.* v. *Bolton*, 1 Q.B. 66; *R.* v. *Fuller*, 1 Ld. Raym. 509; *R.* v. *Millard*, 17 Jur. 400, 22 L.J.M.C. 108.

A complaint or information in matters to be summarily tried by a justice of the peace may be made either by the complainant personally or by his counsel or attorney or other person authorized in that behalf. Cr. Code 845 (3).

The proceeding which forms the groundwork of a "conviction" is termed laying or exhibiting an *information*, while the proceeding for the obtaining of an "order" of justices is termed making a *complaint*. Paley on Convictions, 7th ed., 73.

By Cr. Code, sec. 845 (2), an information or complaint for any offence or act "punishable on summary conviction" need not be under oath unless specially required by the particular Act or law. The statute which authorizes summary proceedings against a tenant for the fraudulent removal of goods is one of these, and specially requires that the complaint be made *in writing* by the landlord, his bailiff, servant, or agent; 11 Geo. II. (Imp.), c. 19, s. 4; and a conviction under that Act must show that the complaint was so made. *R.* v. *Fuller*, 2 D. & L. 98; *Coster* v. *Wilson*, 3 M. & W. 411; *R.* v. *Davis*, 5 B. & Ad. 551.

A *variance* between the information and the evidence adduced in support thereof at the hearing, in a matter to which the summary convictions clauses of the Code apply, will not invalidate a conviction based on the evidence unless (1) objection was made before the convicting justice, or (2) an adjournment of the hearing was refused notwithstanding that it was "shewn to such justice" that by such variance the defendant had been deceived or misled. Cr. Code 882. If any *variance* between the information and the evidence adduced in support thereof as to the place in which the

Note—*Continued.*

offence is alleged to have been committed, or any *other* variance between the information and the evidence, appears to the justice to be such that the defendant has been thereby deceived or misled, the justice may upon such terms as he thinks fit adjourn the hearing of the case to some future day. Cr. Code 847. The intention of the adjournment is that the accused may be prepared to meet the varied charge disclosed by the evidence, and the better practice is to have the information amended and re-sworn by the complainant. These provisions as to variance do not, however, extend to a case where the information has been laid and the party summoned for one offence, and the justices have convicted him of another and different offence punishable in another and a different way. *Martin* v. *Pridgeon* (1859), 28 L.J.M.C. 179, 1 E. & E. 778; *R.* v. *Brickhall*, 33 L.J.M.C. 156.

And a conviction is not to be quashed on certiorari, although it does not describe an offence against the law, *ex. gr.*, by reason of an omission to state *scienter* of the accused, if the Court, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed. Cr. Code, 889; *R.* v. *Crandall* (1896), 27 Ont. R. 63.

[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. RILEY.

Vagrancy—No visible means of support—Gaming—Summary conviction—Two offences—Cr. Code 207 (a), 207 (l).

1. The evidence on a charge of vagrancy under Cr. Code 207 on the ground that the accused had for the most part supported himself by gaming and crime must shew that the gaming or crime took place during the time within or for which he is charged in the information with having been a vagrant.
2. If the accused resides for a portion of the year with his parents at their request, they being able and willing to provide for his support, a conviction for vagrancy under Cr. Code 207 (a) because "not having had any visible means of maintaining himself he had lived without employment" should be quashed.
3. *Semble*, although it may appear that part of the money by which the accused is supported with his parents had been acquired by him by his gaming, etc., prior to the time of the offence charged, and that the accused while so resident with his parents idled away his time in places of public resort, such does not justify a conviction for vagrancy.

MONTREAL, April 20, 1898.

WURTELE, J.—

An information was laid against the defendant, on the 20th day of January, 1897, under paragraph (*a*) of Article 207 of the Criminal Code, respecting vagrancy, charging him with having been a loose, idle and disorderly person, inasmuch as, not having had any visible means of maintaining himself, he had lived in the City of Montreal for the last two months, without employment.

The case was tried before one of the Judges of the Sessions of the Peace, and on the 18th of June, 1897, he was convicted of having been a vagrant, because "not having had any visible means of maintaining himself he had lived without employment, and having had no peaceable profession or calling to maintain himself by he had for the most part

supported himself by gaming and crime," and he was condemned to be imprisoned for such offences for the space of three months.

An appeal was taken against the conviction, and the parties and their witnesses have been heard.

The witnesses for the prosecution, who are all detectives, stated that for the two months previous to the 20th of January, 1897, they had frequently seen him on the streets and in saloons idling away his time, and that he had not, to their knowledge, any visible means of maintaining himself. They also stated that he had told them that he worked during the summer months for a show, and that by such means he made enough money to maintain himself for the whole year. But although they did not testify to any positive knowledge of the fact, they gave it to be understood that his ways of getting money during the time when he was employed in the summer were rather crooked; that, in fact, he got his money partly by gaming and trickery. The defendant's mother and sister gave evidence on his behalf, and they testified that it was at their request that he came back to Montreal to spend the winter months; that during those months he lived with his mother; that when he returned from working with the show he always gave his mother money for the purpose of providing for his maintenance while here, and that, even if he had not given his mother any money, she had the means of keeping him at home, and was willing to do so, and that he remained with her at her special request.

The paragraph of the article of the Code relating to vagrancy, which makes it an offence for anyone not having visible means of maintaining himself to live without employment, is founded on the ground that persons who live without labor or visible means of support and idle away their time are mischievous and dangerous persons, who must either support themselves by unlawful means or become an undue charge on the public charity, and who are consequently nuisances to society in general.

The mere fact of living without employment is not an offence against the law, if the person living without employ-

ment is able to do so, because he has sufficient means either belonging to himself or which are provided for him in a legitimate way. The sons of persons possessing sufficient means to maintain their families, who live at home and who are provided for by their parents, are not vagrants because they live without employment. The policy of the law against idlers is to protect the public against men who, while avoiding labor and employment, live by trickery and cheating and by preying upon other men. But where a person is supported either by his own means or by his parents, it cannot be presumed that he will have to resort to unlawful means to live, and that he is consequently a vagrant.

In the present case, the defendant, if he did not make enough money during the summer months to provide for his support during the whole year, lived with his mother, who provided for his livelihood, and he therefore does not fall under the scope of the law respecting vagrancy.

The charge made against the defendant was simply of living without employment, and without having any visible means of maintaining himself, but he was also convicted of having supported himself by gaming or crime, while having no peaceable profession or calling to maintain himself by. This addition to the conviction is irregular and illegal, inasmuch as he was not charged with the latter offence by the information. But, besides this, the evidence adduced on the appeal does not establish that he had supported himself by gaming or crime during the two months mentioned in the information, and does not, therefore, justify a conviction on that ground.

The conviction is therefore bad on both grounds. I maintain the appeal and quash the conviction.

Conviction quashed.

J. P. Cooke, Q.C., for the Crown.
W. A. Weir, for the appellant.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J. Q.B., FALCONBRIDGE AND STREET, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. HOLMES.

Husband and wife—Non-support—Proof of marriage—Evidence of death of former husband—Cr. Code 210 (2).

1. Where the complainant in a charge of non-support of wife had been previously married, but had always lived apart from her first husband, and swore to having heard two years before the second marriage that her husband was dying in a foreign country, and that about a year after her second marriage she again heard that her husband was dead, such was held to be evidence to go to the jury to prove that her first husband had died before her marriage to the defendant.

DECIDED: March 7, 1898.

Case reserved from the Court of General Sessions of the Peace for the County of York.

The defendant, William Henry Holmes, was charged under section 210, sub-section 2, of the Code, by his wife, Annie Holmes, with unlawfully refusing to provide for her the necessary food, clothing, lodging, and other necessaries, so that the health of the said Annie Holmes was, or was likely to be, permanently injured.

The evidence showed that the parties were married on the 25th of June, 1890, but that Annie Holmes had been married to one Charles Wheatley on the 24th of July, 1886, and she swore that she had never cohabited with Wheatley, who was convicted of an offence for which he suffered imprisonment, and that they never lived together either before or after marriage.

The complainant also swore that some time in the year 1888, she received a letter from a person whose name she could not remember, stating that Charles Wheatley was in a hospital in Rochester dying, and asked her to come and see him, which letter was destroyed. This was the last she heard

of Wheatley, save that about a year after her marriage to Holmes she again heard that Wheatley was dead.

The defence rested their case solely on the ground that the Crown had failed to prove that the complainant was the wife of the defendant, contending that it was necessary to prove that Charles Wheatley died before the 25th of June, 1890, the date of the defendant's marriage, and that there was no evidence to go to the jury to prove that Charles Wheatley died before that date.

The defendant was convicted.

The reserved case was whether there was any evidence to go to the jury upon which they could find that Charles Wheatley was dead on the 25th of June, 1890, and that the complainant was the lawful wife of the defendant.

J. M. Godfrey, for the defendant, referred to *Re Rhodes, Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586; *Thomas* v. *Thomas* (1864), 2 Dr. & Sm. 298.

J. R. Cartwright, Q.C., Deputy Attorney-General, contra, referred to *The King* v. *The Inhabitants of Twyning* (1819), 2 B. & Ald. 386; *The Queen* v. *Lumley* (1869), L.R. 1 C.C.R. 196; *In re Phene's Trusts* (1869) L.R. 5 Ch. 139.

TORONTO, March 7, 1898.

The Court was of the opinion that there was evidence from which the jury might have found that Wheatley was dead at the time of the second marriage, and affirmed the conviction.

Conviction affirmed.

Note: *Presumption—Continuance of life—Absence for less than seven years.*

By the law of England there is no presumption in favour of the continuance of life, though an inference of fact may be drawn that a person alive and in health on a certain day was alive a short time afterwards. If he has not been heard of for seven years, there is a presumption that he is dead; but at what time within that period he died is not a matter

of presumption, but of evidence, and the onus of proving that the death has or has not taken place at any particular time within the seven years lies on the person who claims a right to the establishment of which that fact is essential. Stevenson on Presumption of Life (1893), 137; *Nepean* v. *Doe* (1833), 2 M. & W. 894, 5 B. & Ad. 86; *re Green* (1865), L.R. 1 Eq. 288; *re Phene's Trusts* (1870), 5 Ch. 139; *re Lewes' Trusts* (1871), 6 Ch. 356; *re Thomson*, L.R. 12 P.D. 100. "The presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." *Nepean* v. *Doe*, 2 M. & W. 894, approved in *re Phene's Trusts*, L.R. 5 Ch. 139, 149, and in *re Rhodes*, *Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586, 589. In *R.* v. *Lumley* (1869), 1 C.C.R. 196, the prisoner was tried for bigamy, and it was proved that in 1836 she had married A., that she left him in 1843 and re-married in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age. It was held, on a case reserved, that a direction to the jury was erroneous, which stated that "there being no circumstances leading to any reasonable inference that he had died, the first husband must be presumed to have been living at the date of the second marriage." In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of

fact. The question is entirely for the jury; the law makes no presumption either way. *R.* v. *Lumley* (1869), L.R. 1 C.C.R. 196 (Kelly, C.B., Byles, Lush and Brett, JJ., and Cleasby, B.); *R.* v. *Twyning*, 2 B. & Ald. 386; *R.* v. *Harborne*, 2 A. & E. 540.

[COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE SIR ALEXANDER LACOSTE C.J., BOSSÉ, BLANCHET WURTELE AND OUIMET, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. PAQUIN.

Reserved case—Jurisdiction of presiding judge as a question reserved—Reservation of, after sentence and during imprisonment—Cr. Code 743, 763.

1. A reserved case may be granted under Cr. Code 743 at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favour.

2. Whether the judge presiding at the trial had jurisdiction to summarily try the defendants is a "question of law" under Cr. Code 743 and may be the subject of a reserved case.

DECIDED: May 26, 1898.

Case reserved by Mr. Sheriff Rivard, presiding at the special Session of the Peace for the district of Joliette.

J. N. Prud'homme, for the prisoner.
F. O. Dugas, Q.C. for the Crown.

MONTREAL, May 26, 1898.

The judgment of the Court was delivered by

WURTELE, J.—

The prisoner was the postmaster in the parish of St. Cuthbert, and on 23rd February, 1897, he was arrested on the charge of having on the 15th day of that month unlawfully

issued twenty-one money orders for $100 each payable at Montreal to his order, with the fraudulent intent of appropriating the sum of $2,100 for which they were made, of the monies of the Government of the Dominion. On the 24th of the same month, he was committed for trial. On the 2nd March, 1897, he was brought before A. M. Rivard, the sheriff of the district of Joliette, and consented to be tried by him, under the provisions of part LIV of the Criminal Code relating to the speedy trial of indictable offences; he pleaded guilty, and was forthwith sentenced to an imprisonment of three years in the penitentiary at St. Vincent de Paul. He was immediately sent to the penitentiary, and is still confined there.

At the time of his trial and of the sentence rendered against him there was a district magistrate for the district of Joliette. J. C. L. de Martigny was appointed for the districts of Terrebonne, Ottawa and Joliette, on the 10th November, 1896, was gazetted on the 21st, and took the oath of office on the 25th of that month, and on the 2nd March, 1897, he was in office as such district magistrate for the district of Joliette.

This appointment appears not to have been noticed at Joliette at the time of the prisoner's trial and sentence, and at all events, both the sheriff and the prisoner were ignorant of it. The prisoner only lately became aware of the appointment, and was advised that the sheriff had been consequently without jurisdiction in the case against him. On the 13th May instant he applied to the sheriff, as the judge who had presided at the special Session of the Peace at which he had been tried and condemned, for a reserved case, and on the 16th of this month Mr. Sheriff Rivard after having been made aware of the facts, thought that it would be proper, under the circumstances of the case, to reserve the question of his jurisdiction, and he therefore stated a case for the opinion of this Court.

In the case so stated, the fact that Mr. de Martigny was in office as a district magistrate for the district of Joliette on the 2nd March, 1897, is admitted, and it was also admitted at

the argument by the Attorney-General's substitute. The question submitted for the opinion and decision of this Court is whether such being the case the sheriff had any jurisdiction in the matter?

Three questions present themselves in this case for the consideration of the Court:

1. Can a reserved case be allowed at such a remote date from the sentence, and while the condemned person is undergoing the punishment inflicted?

2. Is the question whether the sheriff had jurisdiction in the matter a question of law which is susceptible of being reserved for the opinion of the Court of Appeal?

3. If the two first questions should be answered affirmatively, had the sheriff jurisdiction to sit as judge on a speedy trial when there was a district magistrate for the district?

I will take up these three questions in the order in which they are put.

Article 743 of the Criminal Code gives to the court before which an accused person is brought for trial the right to reserve any question of law arising out of the proceedings during or after the trial; and no time is specified within which the application for the reserved case must be made, or within which a case must be stated and brought before the Court of Appeal.

Mr. Justice Taschereau in his Commentaries on the Criminal Code gives the rule in explicit language on page 868:—"A case may be reserved after the trial and even after the sessions of the court are over," and he adds:—"If the judge who presided at the trial is unable to send up the case reserved any judge of the same court may do it."

In the case of *Regina* v. *Brown*, which is reported on page 715 of Volume 16 of Cox's Criminal Law Cases, Lord Coleridge of his own motion reserved a question of law after the defendant, who had pleaded guilty, had been committed to prison to serve the term of imprisonment to which he had been sentenced; and in that case it was held that the Court for Crown Cases Reserved had jurisdiction to entertain and consider the case.

It is clear, therefore, that a question of law can be reserved for the opinion of the Court of Appeal after a trial, and as the law imposes no limitation of time within which it must be done, a reserved case may be granted at any time, however remote from the date of the trial or judgment, and even when the condemned person is imprisoned under the sentence rendered against him, if it is still possible that some beneficial result may be obtained by a decision in favour of the prisoner. In the present instance the reserved case was therefore properly allowed.

Whether a judge in any matter has jurisdiction and power to act depends on the construction of the law invoked as the authority for the jurisdiction and power claimed by him, and the question is essentially one of law, and therefore, susceptible of being reserved. In deciding in this sense, we follow the recent case of *The Queen* v. *Jesse France, et al*, which was decided on the 15th February, 1898, and in which of the questions reserved and submitted to the Court of Appeal was whether the judge had jurisdiction to summarily try and convict the defendants. (1 Can. C.C. 321).

Having answered the two preliminary questions affirmatively, we must now consider the question reserved by the sheriff and submitted for our opinion,—whether he had jurisdiction and power to try, convict and sentence the prisoner.

Article 763 of the Criminal Code confers the power to preside over the court for the speedy trial of indictable offences in any district in the Province of Quebec, upon the judge of the Sessions of the Peace; then if there should be no judge of sessions, upon the district magistrate; and lastly, if there should be neither a judge of sessions nor a district magistrate, upon the sheriff of the district. In the present case there was at the time of the trial of the prisoner, and on the day on which the sentence was rendered against him, a district magistrate for the district of Joliette, and we are therefore of opinion that the sheriff was without any jurisdiction or power to hold the court, to sit on the trial, or to render any sentence in the matter.

The conviction and sentence of the prisoner are consequently illegal, null and void, and we quash them and set them aside, and we further authorize, direct and require the Warden of the Penitentiary to forthwith discharge the prisoner.

Conviction quashed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J. Q.B., FALCONBRIDGE AND STREET, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. MACHEKEQUONABE.

Manslaughter—Shooting at supposed 'evil spirit'—Pagan belief—Indians— Cr. Code 230, 236.

1. Homicide under a mistaken Indian belief that the object shot at was not a human being but an evil spirit which had assumed human form and would attack human beings, is manslaughter.

ARGUED : February 8, 1897.
DECIDED : February 8, 1897.

Case reserved under the Criminal Code as to whether the prisoner was properly convicted of manslaughter at the trial which took place at Rat Portage on the 3rd of December, 1896, before Rose, J., and a jury.

The Criminal Code, 1892, sec. 230, enacts that "culpable homicide not amounting to murder is manslaughter."

It appeared from the evidence that the prisoner was a member of a tribe of pagan Indians who believed in the existence of an evil spirit clothed in human flesh, or in human form called a Wendigo which would eat a human being.

That it was reported that a Wendigo had been seen, and it was supposed was, in the neighborhood of their camp desiring to do them harm.

That among other precautions to protect themselves, guards and sentries, the prisoner being one, were placed out

in pairs armed with firearms (the prisoner having a rifle); that the prisoner saw what appeared to be a tall human being running in the distance, which he supposed was the Wendigo; that he and another Indian gave chase, and after challenging three times and receiving no answer fired and shot the object, when it was discovered to be his own foster father, who died soon afterward.

The jury found affirmative answers to the following questions:

Are you satisfied the prisoner did kill the Indian?

Did the prisoner believe the object he shot at to be a Wendigo or spirit?

Did he believe the spirit to be embodied in human flesh?

Was it the prisoner's belief that the Wendigo could be killed by a bullet shot from a rifle?

Was the prisoner sane apart from the delusion or belief in the existence of a Wendigo?

The learned trial Judge then proceeded with his charge as follows:—"Assuming these facts to be found by you, I think I must direct you as a matter of law that there is no justification here for the killing; and culpable homicide without justification is manslaughter, so that unless you can suggest to yourselves something stated in the evidence, or drawn from the evidence to warrant a different conclusion, I think it will be your duty to return a verdict of manslaughter. You may confer among yourselves if you please, and if you take that view, I will reserve a case for consideration by the Court of Appeal as to whether he was properly convicted upon this evidence."

The jury found the prisoner guilty of manslaughter recommending him to mercy, and the learned Judge reserved a case for consideration, whether, upon the findings of the jury in answer to the questions he had submitted and upon his direction to them and upon the evidence, the prisoner was properly found guilty of manslaughter.

J. K. Kerr, Q.C., for the prisoner. The evidence shews the Indian tribe were pagans, and believed in an evil spirit

clothed in human form which they called a Wendigo, and which attacked, killed and ate human beings. The man that was shot was thought to be a Wendigo, a spirit as distinguished from a human being. It is true there was a mistake, but there was no intention even to harm a human being much less to kill. The evidence shews the mistake was not unreasonable. At common law the following of a religious belief would be an excuse. The trial Judge wrongly directed the jury to find the prisoner guilty. There should be a new trial at least. I refer to *Levet's Case*, 1 Hale 474; 1 Bishop on Criminal Law, 7th ed., sec. 305 and note; *Territory* v. *Fish*, cited in note p. 185, is almost a parrellel case; *Plummer* v. *The State*, 4 Texas App. 310; *Regina* v. *Rose*, 15 Cox C. C. 540; *Regina* v. *Wagstaffe*, 10 Cox C.C. 530; *State* v. *Nash*, 88 N. Car. 618; *Regina* v. *Mawgridge*, Kelyng's C. C. 167 [119].

John R. Cartwright, Q.C., Deputy Attorney-General was not called on.

TORONTO, February 8, 1897.

The judgment of the Court was delivered by

ARMOUR, C.J.—

Upon the case reserved if there was evidence upon which the jury could find the prisoner guilty of manslaughter it is not open to us to reverse that finding, and the question we have to decide is whether there was such evidence.

We think there was, and therefore do not see how we can say that the prisoner was not properly convicted of manslaughter.

Conviction affirmed.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, J.

THE QUEEN v. GORDON.

Speedy trial—Adjournment—Election to proceed in absence of material witness—Discretion to allow change of election, although acted upon—Cr. Code 777.

1. An adjournment of a speedy trial may be made under Cr. Code 777 in order to obtain the attendance of a material witness, although the party applying for same had elected to proceed without such witness, and although the trial had commenced.

The prisoner, charged with larceny, had been in custody for nine months, awaiting a speedy trial, several postponements having been granted at the instance of the Crown, and none at the instance of the accused. The Crown now elected to go on without a witness who had given evidence in the Police Court, and the trial commenced and one or two witnesses had given their evidence.

Smith, Deputy-Attorney-General, for the Crown, now applied for an adjournment to procure the witness, who was in Cassiar.

Hunter, contra: The accused has been in jail for several months awaiting a speedy trial and has never sought an adjournment. The Crown ought to be held to its election, especially after the trial has commenced and as the nature of the evidence was known. This is not the speedy trial provided by the law.

VICTORIA, B.C., June 6, 1898.

WALKEM, J.—

I have no doubt I have the power to grant the adjournment, notwithstanding that there was an election and that the trial has commenced, and I think that this is a proper case in which to exercise it.

Adjournment granted.

Note: *Speedy trial by consent without jury—Power of adjournment—Cr. Code 777.*

Sec. 777 of the Criminal Code, 1892, enacts that "The judge may adjourn any trial from time to time until finally terminated." This section applies only to "speedy trials" held under the provisions of secs. 762-781, with the prisoner's consent for trial thereunder without a jury.

The result would appear to be that, although these sections were intended to give the prisoner the benefit of a trial at an earlier date than if he took his trial with a jury (sec. 772), the exercise of the power of adjournment may place him under the disadvantage of having to remain in custody awaiting trial, for a longer period than would be possible if his trial were before a jury.

The following cases indicate the common law practice, in jury trials, after the trial proceedings have commenced:

In *R.* v. *Wenborn* (1842), 6 Jurist 267, the prisoner was indicted for stealing a grate. All the witnesses for the prosecution having been examined, it was discovered that the stolen property was not ready to be produced for the inspection of the jury, it having been deposited at an inn at some distance from the court-house, but in the same town. Gurney, B., directed that a messenger be sent to bring the stolen article and that another case be proceeded with, but that the prisoner be not taken from the dock. On the return of the messenger with the stolen article, the trial was resumed, several other cases having been tried in the meantime.

And where, owing to the detention of a train, the witnesses for the prosecution had not arrived, and the case for the prosecution had been opened, the trial was adjourned and the jury locked up. *R.* v. *Foster*, 3 Car. & K. 206.

On a trial for bigamy before Willes, J., and a jury in 1864, the jury were sworn, and counsel for the prosecution opened the case and called and examined the first witness. The other witnesses, on being called, did not answer, being temporarily absent, and Willes, J., said: "I could have adjourned the case, if no evidence had been called, but not

Note—*Continued.*

after evidence called. If the witnesses do not appear, the prisoner is entitled to be acquitted for want of evidence." *R.* v. *Robson* (1864), 4 F. & F. 360.

In *R.* v. *Tempest* (1858), 1 F. & F. 381, Watson, B., held that without statutory authority such as had been enacted in respect to civil causes there was no power to adjourn a criminal trial, even until a later part of the same day, after the jury had been sworn and the case opened for the prosecution; but in a note to the report of that case an instance is stated where Willes, J., in a case where the prosecutrix had not appeared waited until the next case was ready.

The case of *R.* v. *Tempest* was, however, disapproved of by Cockburn, C.J., in *R.* v. *Fernandes*, Q.B. (1861), referred to in a note to *R.* v. *Parr* (1862), 2 F. & F. 861, where a distinction is drawn between an adjournment, which in strictness means to another day, and a mere suspension of proceedings for a short time on the same day, not necessitating the jury leaving the box nor locking up the jury, which would be improper for a mere default on the part of the prosecution or for a mere defect in the proof.

In *R.* v. *Parr* (1862), 2 F. & F. 861, it was held by Wightman, J., that on a jury trial for felony the judge has no authority to order an adjournment to another day, because of the absence of the prosecutor and his witnesses, after the prisoner had been arraigned and given in charge of the jury; and in a note to the report a similar ruling is referred to as having been made by Alderson, B. (2 F. & F. 862).

On a trial with a jury, sec. 673 of the Criminal Code applies, which as amended in 1895, is as follows:—

673. The trial shall proceed continuously subject to the power of the court to adjourn it.

(2.) The court may adjourn the trial from day to day and, if in its opinion the ends of justice so require, to any other day *in the same sittings.*

(3.) Upon every adjournment of a trial under this section or any other section of the Act the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury

Note—*Continued.*

from holding communication with any one on the subject of the trial. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death. In other cases, if no such direction is given, the jury shall be permitted to separate.

(4.) No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., AND MEREDITH, J.

THE QUEEN v. LORRAIN.

Lottery—Exception of distribution of works of art—Alternative of value in money—'Property,' meaning of—Cr. Code 3 (v), 205.

1. The disposal by a lottery or mode of chance 'of any property,' under Cr. Code sec. 205 (1b) need not be of any specific article or property, and it will constitute an offence although the winner obtains only the privilege of choosing from certain prizes offered.
2. The exception from the provisions of Cr. Code sec. 205 in respect of lotteries, which by sec. 205 (6 b) is made in respect of the distribution of paintings, etc. among ticket holders of any incorporated society established for the encouragement of art, will not apply if money may be had by the winners instead of paintings, etc., and this notwithstanding that the option is wholly that of the society to pay in money one-half the stated value of the painting.

ARGUED: October 13, 1896.

DECIDED: November 3, 1896.

Motion to quash a conviction of the defendant by the Police Magistrate of the City of Toronto.

The defendant was an agent of the "Society of Arts of Canada (Limited)," and sold tickets entitling the purchaser to share in a distribution by lot among the ticket holders of paintings, drawings, or other works of art, in the following form:

Incorporated by Letters Patent, 27th February 1893. Capital Stock, $100,000.

THE SOCIETY OF ARTS OF CANADA.
Limited.
Head Office—Montreal, Canada.

Founded with a view to spread the taste for arts and to encourage and help artists.

10 Cts.

For value received the bearer has the privilege to buy the works of art of this Society at a reduction of 5%, or is entitled to compete in the distribution authorized by law, of works of art of the Society, which will take place at the date mentioned on the back of this script. 85609.

After three months from said date, this script will not be held good, and any erasure, alteration or mutilation renders it void.

The Society of Arts of Canada
(Limited). 85609.

On the back was stamped. Distribution
29 April, 1896.

The charge was laid under sub-sec. (*b*) of sec. 205 of the Criminal Code, and the conviction was in the words: "For that he (the defendant) did unlawfully sell and barter a certain card and ticket for advancing, lending, giving, selling and otherwise disposing of certain property, to wit, pictures, or one-half the stated value of each picture in money by lots, tickets and mode of chance, contrary to the form of the statute, etc."

Section 205 of the Criminal Code provides as follows:

205. Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding $2,000, who—

(*b*) sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of

any property, by lots, tickets, or any mode of chance whatsoever.

(6.) This section does not apply to—

(*c*) any distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings, drawings or other work of art produced by the labour of the members of, or published by or under the direction of, such incorporated society;

F. A. Anglin, for the motion. The evidence does not show that the ticket sold by the defendant was for the "disposing of any property" under sub-sec. (*b*) of sec. 205 of the Code. "Property" means specific property. The holder of a winning ticket had no right to any specific property. The conviction is bad under *Regina* v. *Dodds*, 4 Ont. R. per HAGARTY, C.J., at p. 393. The definition of "property" in the Code, sec. 3, sub-sec. (*v*), is no wider than it was under C.S.C. ch. 95, sec. 7, and the winner was not to be entitled to any specific picture, but only to a choice of one or more out of many pictures. The society reserved to itself the right to decide that the winners must take pictures, and only gave cash if deemed advisable in the interest of the society, and the pictures offered were the works of its members. In any event, as the society was incorporated, the sale of the tickets is specially excepted under sub-sec 6 (*c*).

John R. Cartwright, Q.C., Deputy Attorney-General, contra. "Property" under the Code includes "every kind of real and personal property": sec. 3, sub-secs. (*v.* 1). The evidence shows the whole thing was a scheme. Paintings were purchased for the lottery prizes, and while the tickets did not announce that half the value of the prizes could be had in money, the ticket agents did, and the common practice was to give money, and the magistrate held the pictures were a mere pretence for the money scheme.

Anglin, in reply.

TORONTO, November 3, 1896.

The judgment of the court was delivered by

BOYD, C.—

The conviction for that Lorrain did "unlawfully sell and barter a certain card and ticket for advancing, lending, giving, selling, and otherwise disposing of certain property, to wit: pictures, or one-half the stated value of each picture in money, by lots, tickets, and mode of chance," is complained of on two grounds:

First, that the evidence shows that no specific property was to be thus disposed of by chance.

And second, that the evidence shows the case to be within the exception extended to distribution by lot of works of art.

In support of the first objection the interpretation clause of the Code as to property is relied on, and the opinion of the Chief Justice expressed in *Regina* v. *Dodds*, 4 Ont. R., at p. 393, that the original of the present law contemplated and was limited to dealing with lotteries of specific lands, goods and chattels. The phrase in the Code 205 (*b*) is "disposing of any property," and the clause of interpretation as to "property" simply states that it includes "every kind of real and personal property." So that from the mere language of the Code I do not perceive that property in this connection is to be read "specific property." The essence of the enactment lies in the disposal of any property by any mode of chance, and it would be an easy evasion if the statute could be got rid of by designating no particular thing, although the winner would be able to exercise his choice among the available prizes offered. As said in *Taylor* v. *Smetten*, 11 Q.B.D. at p. 212: "It seems utterly immaterial whether a specific article was or was not conjoined with the chance and as the subject-matter of the sale." See also *Commonwealth* v. *Wright*, 137 Mass. 250.

I may also quote the pertinent words of Mr. Justice Montague Smith in *Regina* v. *Harris*, 10 Cox C.C. 352, 353, where he said the mischief struck at by the Lottery Act was where subscribers were induced to part with their money in the hope of obtaining not only their alleged shilling's worth, but something of much greater value, the right to which was

to be ascertained by chance. The judgment of the court in *Regina* v. *Dodds*, 4 Ont. R. 393 does not turn on the opinion expressed by the Chief Justice, and the case itself is not in point here.

The other objection rests on the evidence, and having read it, I cannot say that there is a lack of evidence to warrant the finding that money might be had instead of pictures by the winning tickets. The agent so represented on the sale of the ticket, and the agent at headquarters paid over money on request to various winners. This element destroys the privilege in favour of the dissemination of works of art, and lets in the vulgar non-æsthetic aspect of chance-venture for money common to these lottery undertakings.

Even if there was uncertainty in the getting of money on the tickets because of it being reserved for the option of the society, as was argued, that does not appear to be material. This would only intensify the precariousness of the whole transaction, and add another chance to the excitement of the investor: see *Morris* v. *Blackman*, 2 H. & C. 912, and *The State* v. *Shorts*, 3 Vroom (New Jersey) 398.

Altogether there appears to be no reason to disturb the conviction, and it stands affirmed with costs.

Conviction affirmed.

[SUPREME COURT OF NOVA SCOTIA.]

TRIAL BEFORE GRAHAM, J., WITH A JURY.

THE QUEEN v. JACKSON.

Evidence—Confession—Admissibility—Inducement by prosecutor.

1. Evidence is inadmissible of a confession by the accused that he had stolen money from his employer, when such confession was induced by a statement of the employer that it would be better for the accused to confess, and that if he did not do so, he, the employer, would send for an officer.

SYDNEY, N.S., July 2, 1898.

The defendant was indicted for stealing money while in the employ of prosecutor, John W. Ingraham. Marked money was given to several pretended purchasers to purchase goods from defendant in the warehouse or lower store, which was distant from the general store about 100 yards. There was no "till" or place to put money in the lower store, and the clerks generally carried the money received there in their pockets to the upper store. The prosecutor accused the defendant of stealing a piece of this marked money, which defendant denied, but afterwards took one of the marked coins out of his pocket, claiming that he forgot to put it in the till. The prosecutor accused him of stealing other sums, which defendant denied. A brother of prosecutor, who was the general manager of the business, wrote to defendant, and handed to him, while his brother was accusing him of stealing, a paper containing words to this effect: "You had better confess. It will be better for you, as we know all." The prosecutor at the same time said: "If you don't, I'll go for an officer." After prosecutor left the office where the conversation took place, the defendant made a confession of having stolen several pieces of money to purchase several named articles for himself. The defendant also made a similar confession to prosecutor and others, and a number of witnesses were called to prove these confessions, the prosecutor's brother

being the last, and the facts then appeared as set out above as to the statements he and the prosecutor had made to the prisoner before the confession.

Counsel for the defendant then moved to strike out all the evidence relating to the confessions, and cited *R.* v. *Rose,* (1898) 67 L.J. Q.B. 289.

Held, that the motion must be granted, and such evidence was accordingly struck out.

The case went to the jury on the evidence of the coin found in defendant's possession; and inasmuch as other persons in the employ admitted to having carried money received in the lower store in their pockets for several days, the jury acquitted the defendant.

John A. McDonald for the defendant.
D. A. Hearn and *W. R. A. Ritchie* for the Crown.

Note: *Confession—Admissibility in evidence—Confession partly voluntary.*

The confession of a prisoner, to be admissible, must be free and voluntary. "Saying to the prisoner that it would be worse for him if he did not confess, or that it would be better for him if he did, is sufficient to exclude the confessions, according to constant experience." 2 East's Pleas of the Crown (ed. 1803), p. 659. The same rule is recognized by modern authority. *R.* v. *Baldry* (1852) 2 Den. C.C. 430, 21 L.J.M.C. 130; *R.* v. *Jarvis* (1867) L.R. 1 C.C.R. 96; *R.* v. *Thompson,* (1893) 2 Q.B. 12; *R.* v. *Rose* (1898) 67 L.J.Q.B. 289.

Where before the making of a confession the prosecutor had said to the prisoner's brother, "It will be a right thing for your brother to make a statement," but at the time of the confession no threat was used nor promise made, the court drew an inference that the prisoner when he made the confession knew that the prosecutor had spoken these words to his (the prisoner's) brother, and that the confession not having been satisfactorily *proved to have been* free and voluntary, the

Note—*Continued.*

evidence ought not to have been received. *R.* v. *Thompson* (1893) 2 Q.B. 12 (Coleridge, C.J., Hawkins, Cave, Day and Wills, JJ.)

Where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession is not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say *something*. *R.* v. *Baldry* (1852) 2 Den. C.C. 430.

"The words 'you had better tell the truth' seem to have acquired a sort of technical meaning importing either a threat or a benefit." *R.* v. *Jarvis* (1867) L.R. 1 C.C.R., 96, per Kelly C.B.

The recent English decision of (*R.* v. *Rose* (1898) 67 L. J.Q.B. 289 referred to in the judgment above reported, is of much importance on this subject. The prisoner had been asked by his master, a farmer, in the presence of a police constable, how he accounted for the number of sheep on the farm not being so large as it should be, and had answered that he had sold some of them and had not accounted to his master for the money which he had received for them. This part of the confession was made voluntarily, but afterwards he was pressed to make a clean breast as to *all* the property his master suspected him to have improperly dealt with. The prosecutor admitted on cross-examination that when he asked the prisoner whether he had let any corn go off the place he *might* have said "you had better tell me about all the corn that is gone"; and the prosecutor would not swear that he did not induce the prisoner to confess about the corn. There were also subsequent statements of the prisoner to other witnesses to the same effect as the alleged confession in regard to the corn. The evidence of the prosecutor was given without any objection being made to its admissibility. After some other witnesses had been called the prosecution called a nephew of the prosecutor and on his cross-examination this witness stated that he came up to the

Note—*Continued.*

prosecutor and the prisoner when they were talking about the corn and that the prosecutor "then asked the prisoner to speak the truth and said it would be better for him if he did so." Counsel for the prisoner then submitted that there was no case to go to the jury, as the statements made by the prisoner were made after an inducement held out to him by the prosecutor to confess, as stated by the nephew. The objection having been overruled at the trial by the chairman of the Sessions, a reserved case was stated for the opinion of the Queen's Bench Division, as to whether the chairman ought to have withdrawn the case from the jury on the ground of the admissibility of the prisoner's statement. For the prisoner, it was contended that if the confession were in part voluntary it was the duty of the chairman to tell the jury to disregard so much of it as involuntary; but as such a direction would have had little effect after the jury had heard the evidence, the chairman should have discharged the jury. Lord Russell of Killowen, C.J., in delivering the judgment of the Court, quashing the conviction, said:

"It is clear that he (the Chairman of Sessions) ought not to have allowed the whole of the confession to go to the jury; but as to whether he ought to have struck out that part of it which was not voluntary and directed the jury to disregard it, or whether he ought not rather to have discharged the jury and empanelled a fresh one, the Court is not called upon now to determine. . . . As there was evidence of the very words used, and as they in themselves contain an inducement to make a statement, the prisoner's confession, so far as it was made after inducement, was not properly admissible and should not have been treated as evidence to be left to the jury." Hawkins, Mathew, Lawrance and Wright, JJ., concurred. On the same subject see also *R.* v. *Hammond* (1898) 1 Can. C. C. 373 and note to same, pages 398–401.

Whether confession voluntary or not—Onus upon prosecution.

In *R.* v. *Rose* (1898) 67 L.J.Q.B., 289, the doctrine emphasized in *R.* v. *Thompson* (1893) 2 Q.B. 12 was affirmed,

Note—*Continued.*

i.e. that the onus of proving that the confession was made voluntarily and without improper inducement or threats is upon the prosecution.

The Chief Justice, Lord Russell of Killowen, in delivering the judgment of the Court, said (p. 292):

"It must be borne in mind by magistrates, and by prosecuting counsel and by solicitors who instruct them, that in all cases of statements alleged to have been voluntarily made, it is their duty *a priori* to satisfy themselves that the confession of the prisoner can be *affirmatively proved* to have been voluntarily made, and that until they have so satisfied themselves that such a confession of guilt can be affirmatively proved to be voluntary, it cannot be relied on as evidence to go to the jury, and should never be admitted."

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., ROSE AND MACMAHON, JJ., SITTING AS A DIVISIONAL COURT.

THE QUEEN v. QUINN.

Summary proceedings before magistrate—Adjournment sine die to consider judgment—Irregularity—Cr. Code, 857 (1), 858.

1. An adjournment *sine die* of summary proceedings before a magistrate for the purpose of delivering judgment is illegal, and a conviction thereafter made by the magistrate, in the absence of the accused, is void for want of jurisdiction.

ARGUED: October 16, 1896.
DECIDED: January 25, 1897.

Motion to quash a conviction of the defendant made by James Clement and Patrick Jordan, two justices of the peace for the united counties of Stormont, Dundas and Glengarry, for an assault committed on Gordon Rupert.

The information was laid by the complainant Rupert, before James Clement, one of the justices, on the 16th November, 1895. The complaint was heard on the 22nd November, before the above named convicting justices, and James H. McMillan, another justice of the peace for the said counties.

Du Vernet, for the motion.

No one appeared in opposition thereto.

TORONTO, January 25th, 1897.

The judgment of the Court was delivered by

MACMAHON, J.—

From the papers returned in answer to the certiorari it appears that all the evidence, both for the prosecution and for the defence, was heard at the sitting on the 22nd November, 1895. No adjudication, however, was then made, as the justices desired to take the opinion of Mr. Dingwall, the county crown attorney, as to whether the defendant on the evidence had made out that the assault committed by him was justified, having regard to the 53rd section of the Criminal Code.

The justices, although seeking the advice of the county crown attorney before adjudicating on the matter, named no day for giving judgment.

Mr. Clement, after receiving a reply from the county crown attorney expressing the opinion that the defendant should be fined or committed for trial, communicated it to the other justices; and Mr. McMillan states in an affidavit filed on behalf of the defendant, that he was notified by Mr. Clement to meet him at his (Clement's) residence on the 2nd of December, where he attended, defendant and his solicitor also being present. The evidence given at the hearing on the 22nd of November was discussed; but Mr. Clement and Mr. McMillan being unable to agree, no adjudication was made.

The adjournment on the 22nd of November without a day being named on which judgment was to be delivered, was in itself sufficient to render any further proceeding nugatory.

But in addition to that, no adjournment was made on the 2nd of December to any particular day, and no further action was taken by the justices until a communication was received from the county crown attorney requiring the justices to make an adjudication and a return to the clerk of the peace. Then a notice was given by Mr. Clement to the other two justices desiring them to meet him at a time and place named, on the 13th of April, 1896, to deliver judgment. Mr. Clement and Mr. Jordan, two of the justices, met at such time and place and, in the absence of the defendant, and even without notice to him or his solicitor, delivered judgment convicting the defendant of the assault charged, and inflicting a penalty, and directing him to pay the costs.

This proceeding was wholly beyond the jurisdiction of the magistrates, and was in my opinion absolutely void.

In England, prior to the passing of the Imp. Act, 11 & 12 Vict. ch. 43, in cases of summary proceedings, the power existed at common law in the magistrate to adjourn the hearing, and the practice as to such adjournment is thus stated in Paley on Convictions (ed. 1838), pp. 40 and 41: "The hearing may, either upon the application of the defendant, or, for any other cause, be adjourned to a subsequent day; taking care not to exceed the time, if any be limited by the Act, for making the conviction. But if the limitation refers only to the time in which the offence must be prosecuted, * * and not * * to the time of making the conviction, then, provided the information has been laid in due time, the hearing and subsequent proceedings to judgment will be valid, though postponed to a term beyond the period mentioned in the Act."

Subject to the limitations above referred to, the power of the justices at common law to adjourn during the hearing appears to have been almost unlimited. But the question of adjournment after the hearing for the purpose of delivering judgment is not treated or discussed at length in any of the text books I have consulted. When, however, an adjournment took place after the hearing for the purpose of adjudication, it would, in the language of the text already

quoted from Paley, be a "subsequent proceeding to judgment," and would be valid. Such an adjournment must unquestionably have been to a day certain, which would be stated by the justice in the presence of the parties.

Under both the Imperial Act, 11 & 12 Vict., ch. 43, sec. 16, and the Criminal Code of Canada, sec. 857 (1), formerly the 48th section of the Summary Convictions Act, R.S.C. ch. 178, the justices in their discretion may adjourn the hearing to a certain time and place to be stated in the presence of the parties or their attorneys; the difference between the Imperial Act and ours being that under the former the length of time to which the hearing may be adjourned is unlimited, while under our Act the adjournment cannot be for more than one week.

However, the 52nd section of our Act, (now section 858 of the Code) provides that the justice, having heard what each party has to say and the witnesses and evidence adduced, shall consider the whole matter, and unless otherwise provided, determine the same, and convict or make an order upon the defendant, or dismiss the information or complaint as the case may be. The justice may, if the nature of the case permit, be able to consider the case at the close of the hearing, or he may properly, in order to consider the whole matter, be obliged to reserve his decision until a future day. And it has been held that where an adjournment is made at the close of the hearing for the purpose of delivering judgment, the magistrate is not confined to the limit of time mentioned in section 48, but may adjourn for a longer period: *Regina* v. *Hall*, 12 Ont. Pr. 142; *Regina* v. *Alexander*, 17 Ont. R. 458.

But the time to which the adjournment is made must be to a day certain and in the presence of the parties or their solicitors, so as to enable them to be present when the decision is given, otherwise the accused would or might be deprived of his right of appeal. And it was held where several informations depended on the same point of law and a case was granted for the opinion of a superior Court on one conviction, the justices may adjourn the hearing of the other cases

to a future day, and the Court of Queen's Bench refused a mandamus to compel them to proceed to an adjudication: *O'Leary's Case*, Q.B., 22 Nov., 1872, cited in Stone's Justices' Manual, 26th ed., 741. If, however, the adjudication is adjourned *sine die*, a question has been raised whether the whole proceedings do not fall to the ground: *ib.* p. 741.

The question, however, was fully considered in Nova Scotia in *Regina* v. *Morse* (1890) 22 N.S.R. 298, where it was held that where a justice adjourned the trial without day, stating in the presence of all the parties that he would make up his judgment and notify the parties affected, which he did in time for an appeal from the conviction, that no conviction could be made, the justice having lost jurisdiction by the adjournment without day. Mr. Justice Townshend in his judgment, at page 300, made these pertinent observations: "Here the magistrate closed his Court without even putting the defendant under his own recognizance, and thus lost all jurisdiction over him on the particular prosecution before him. One way in which to test the question is to ask, in what way known to the law could he have brought the defendant again before him for the purpose of giving his decision? Again, if not bound to name a day certain, there is nothing to oblige him to give notice of his decision until it is to be acted upon, and how then could the defendant get the full benefit of his right of appeal. All these considerations, to which others might be added, shew that his proceedings after the adjournment of the Court without day were without authority, and the conviction therefore bad." And Mr. Justice Weatherbe said at p. 301: "No Court, I think, has ever held such a conviction good, and no Judge has suggested that such a decision could be sustained as a conviction."

In this case there was no notification whatever of the intention of the justices to meet and deliver judgment, so that this is even a stronger case for the defendant than the one referred to from the Nova Scotia Court.

The conviction must be quashed with the usual protection to the magistrates.

Conviction quashed.

Note: *Adjournment of summary proceedings—Limit of eight days—Cr. Code 857 (1).*

In summary proceedings before justices they need not *eo instanti* set the penalty, but "may adjourn for a little time to consider of the fine." *Rex* v. *Ellwell* (1727), 2 Ld. Raym. 1514; Burn's Justice, 30th ed., vol. 1, 1142. When the justice has commenced to hear the case he then has by the common law an inherent power of adjournment. *R.* v. *Mayor of Clonmel* (1858), 9 Ir. C. L. Rep. 267, 272, 278.

Section 857 (1) of the Criminal Code is as follows:—

Before or during the hearing of any information or complaint the justice may, in his discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective solicitors or agents then present, but no such adjournment shall be for more than eight days.

A limitation of time was first introduced by sec. 46 of 32-33 Vict. (Can.) c. 31, by which it was enacted that no adjournment of the hearing should be made for more than one week, and the same provision was continued in the Summary Convictions Act, R.S.C. (1886) c. 178, s. 48. On the enactment of the Criminal Code in 1892 the time was made *eight* days instead of one week.

In *R.* v. *French* (1887) 13 Ont. R. 80, it was held by Rose, J., that an adjournment of the hearing for a time longer than the statutory limit avoided the conviction, although so adjourned with the consent of the accused, for the effect would be to read into the statute the qualifying words "except by consent of the defendant."

That decision was, however, disapproved in *R.* v. *Heffernan* (1887) 13 Ont. R. 616, where it was held by Robertson, J., that if the accused himself asks the adjournment for longer than the statutory period and attends on the date to which the adjournment is made and takes his chances of a dismissal on the evidence, he is estopped from afterwards urging a want of jurisdiction because of the adjournment.

The limitation applies only to an adjournment of the *hearing* or the further hearing of the information or complaint

Note—*Continued.*

which is distinct from the *adjudication* or determination of the charge after the hearing is completed. *R.* v. *Hall* (1887), 12 Ont. Pr. 142, per Boyd, C., affirmed by the Queen's Bench Division. If the witnesses and evidence have been adduced (Cr. Code 858) the adjournment is neither "before" nor "during" the hearing of the information or complaint, but at its conclusion, in order to determine the case. *R.* v. *Alexander* (1889), 17 Ont. R. 458, 461 (Galt, C.J., Rose and MacMahon, JJ.), approving *R.* v. *Hall*, 12 Ont. Pr. 142.

The "eight days" should be computed from and exclusive of the day of the adjournment. *Williams* v. *Burgess*, 12 A. & E. 635; *R.* v. *Collins* (1887), 14 Ont. R. 613, 617; Wharton's Law Lexicon, 6th ed., 267.

The section is not intended to prevent more than one adjournment. *Messenger* v. *Parker* (1885), 18 N.S.R. 237, 242.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DAVIE, C.J., McCREIGHT AND DRAKE, JJ., SITTING AS A COURT OF CRIMINAL APPEAL.

THE QUEEN v. WOODS.

Murder—Dying declaration—Informal deposition—Improper admission in evidence—Corroboration—New Trial —"Substantial wrong or miscarriage" —Cr. Code 687, 744, 746 (f).

1. The question as to whether there was a settled hopeless expectation of death, so as to justify the admission of a dying declaration in evidence, is for the presiding judge at the trial.
2. The intention of seç. 746 of the Criminal Code is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and is not necessarily a "substantial wrong or miscarriage." (*Makin* v. *New South Wales* (1894) A.C. 57 distinguished.)
3. A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition under Cr. Code 687, because taken in the absence of the accused.

ARGUED : August 18 and 19, 1897.
DECIDED : August 21, 1897.

Appeal by way of case stated for the opinion of the Court of Criminal Appeal, by Walkem, J., who presided at the trial with a jury, from a conviction of the accused for murder.

The question involved was whether certain declarations made by the deceased after the assault, and before his death, were properly admitted as dying declarations, and, if not properly admitted, whether the conviction should on that ground be set aside.

The circumstances under which the declarations were made sufficiently appear from the judgments.

The declaration was in the following terms :

I, Samuel M. Woods, make oath and say as follows: "On the night of October the first, A.D. 1896, I was in bed in my house on Josephine Street, Nelson, B.C. I heard someone in the lower part of the building. I went below to see who was there. I met a man at the corner of the shop and the alley. I asked him what he was doing there. He said (*sic*) had just that instant stopped there. I then took hold of him, and he walked into my smithy or workshop, and I had my hand upon his shoulder. I took my hand from his shoulder, and turned on the electric light. He then put his hand to his hip pocket and pulled out a pistol, a bright one. He raised his hand in which was the pistol, and presented it at my breast, and fired it. I tried to catch the pistol before it was fired. As nearly as I could judge the pistol was a 32-calibre, or possibly a 38. On being shot I staggered against the side of the building, and fell to the floor. After shooting me, the man ran away towards the river. Before I was shot I called for my helper, who sleeps in the same room with me, to come down. He came down and found me lying on the floor. The man who shot me was young, about twenty-eight years, smooth-faced, except as to his moustache, which was light or sandy; his hair, which was short, was also light or sandy. Small soft black hat. I

think his outward clothing was all of one colour, a kind of grey."

The above document was read to the deceased man and signed by him as a dying deposition; but as the prisoner was not present when it was made, the learned Judge rejected it as a deposition, but admitted it as a dying declaration.

Shortly after the deposition had been signed, the prisoner with four or five men, selected at random to tally with the prisoner, was taken into the bedroom of the deceased to see if the latter could identify him. The deceased was lying at the time with his face to the wall, and, on being turned round by the doctor, he pointed out the prisoner as being the man who shot him. The men were then taken out of the room, re-arranged, and brought in in different order. The deceased, after scanning them over, again pointed out the prisoner as the man who shot him, remarking at the time that his hat was more "slouched" when the shooting took place.

The learned Judge at the trial admitted the above-mentioned document as a dying declaration, and also admitted the identification of the prisoner by the deceased as evidence. Objection was taken thereto on behalf of the prisoner; and the learned Judge refusing to reserve the point, the present case was submitted for the opinion of the Full Court, under section 744 of the Criminal Code.

L. P. Duff, for the prisoner, Woods.
E. P. Davis, Q.C., and *A. G. Smith*, for the Crown.

VICTORIA, B.C., August 21, 1897.

DAVIE, C.J.—

Irrespective of the written dying declaration of the deceased, I think the case is abundantly established against the prisoner; and as section 746 of the Code, sub-sec. *f.*, provides that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not

according to law was done at the trial, or some mis-direction given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial, I think the appeal fails.

The prisoner was charged with the wilful murder of Samuel M. Woods, a blacksmith, who kept his forge or smithy at Nelson, and together with his assistant, one Beard, lived and slept upstairs over the shop. Beard had already retired on the night of Friday, 2nd of October, when he was awakened about midnight by the deceased talking to someone just outside the shop. Deceased asked the stranger what he had been doing in the shop, and the stranger denied having been in the shop. The deceased replied, "I saw you turn down the light," and then himself turned the electric light on, whereupon the stranger (and the action was seen by Madame Malette, who was just closing her hotel opposite) drew a revolver and shot the deceased, inflicting a wound from which death ensued some fifty hours later. The assailant ran away, immediately upon the shooting, towards the C.P.R. station. He was seen by several, but owing to the dark could not be identified further than by Mrs. Malette, who, when she saw the deceased and his assailant standing together, describes him as a smaller man than the deceased. At 10.30 next morning, the attention of an engine driver, Alexander Dow, was attracted to the actions of a man lying alongside of the track leading from Nelson to Robson, at about sixteen miles from Nelson; and from information given by Dow to the police, and the description given by the deceased, the prisoner was arrested the same night at Robson, thirty miles from Nelson. Prisoner said nothing when arrested, further than to ask for food. On him was found a 38-calibre Smith & Wesson revolver, carrying a bullet of the same size as that extracted from the body of the deceased upon the *post-mortem*. He had no money or means, and the only other article found on the prisoner's person was an iron "billy," as it is termed, or wrench. Two chambers of the revolver had been discharged, and four were loaded. On the Sunday afternoon

prisoner was taken to the bedside of the dying man, being first informed that he was taken there for identification. Four or five other men were taken in with the prisoner, and the deceased there and then pointed out the prisoner as the man who had shot him. The men were then taken out of the room and brought in again in different order, when the deceased again identified the prisoner as his assailant. Prisoner made no remark either time. There can be no question that at the time of the identification the deceased was dying, and knew that he was dying. As a fact, he died twelve hours afterwards. The prisoner was subsequently committed for trial, and we are not informed that he made any statement upon his committal. He was tried on the 30th of June, 1897, and the deceased's description of the man who shot him was brought out of one of the Crown witnesses upon cross-examination, and agreed in all essential particulars with the description of the prisoner. The prisoner did not avail himself of the opportunity which the law affords him of going into the witness-box, and, after being found guilty, remained silent in response to the demand whether he had anything to say why sentence should not be passed upon him.

Objection is now urged on prisoner's behalf to an *ante-mortem* statement of deceased, reduced to writing, describing the assault and the person of the assailant, and of certain oral statements to the same effect; but the description of the shooting is immaterial, because already described by one eye-witness and another ear-witness, and the description of the assailant as given by the dying declarations seems unimportant also, because given distinctly upon cross-examination at the trial. I am far from saying that they were not admissible as dying declarations, for the evidence shows, I think, that from the time of the shooting, deceased was in a hopeless expectation of death. He told the doctor who attended him within a few minutes of the shooting, and upon the evidence, I think, before any other statement, that he was done for. The doctor tells us that from the very first to the last he had no hope of recovery, and when the written

deposition was being taken, Constable Miles tells us (according to the stenographer's note), deceased said he thought he was going to die, and he wanted to have this thing over as soon as possible. The learned Trial Judge's note is, "Hurry up or I'll die," both notes practically meaning the same thing. In *Reg.* v. *Bernadotti*, 11 Cox C.C. 316, the injured man, in reference to a deposition he was about to make, remarked, "Be quick or I shall die," and Brett, J., after consulting Lush, J., said: "I think this statement admissible. I take the law to be that two facts must concur, (1) that the deceased was at the time of making the statement in such a condition that he believed his death was imminent and impending, and (2) that he was in danger of dying in a short time, without hope of recovery."

If these two circumstances concur, the statement is admissible. Many other cases are to the same effect. There must be a settled hopeless expectation of death; *Reg.* v. *Gloster*, 16 Cox 471; *Reg.* v. *Jenkins*, L.R. 1 C.C.R. 187; *Reg.* v. *Reaney*, D. & B. 151; and whether such was the case is a question for the Judge at the trial, who in this case has found that this condition existed. It would require a very strong case for the Court of Appeal to interfere with his ruling, arrived at after seeing the witnesses and observing their demeanour, an advantage which the Court of Appeal is without. In this case, however, I do not hesitate to say that after perusal of the evidence I agree with the reasons of the learned Trial Judge, which he gives in the case stated. It was not quite clear whether the written declaration was read over before being signed, and moreover the case of *Reg.* v. *Mitchell*, 16 Cox 503, may be an authority for saying that the written declaration must express the *ipsissima verba* of the dying man, in which case the declaration in this case might be defective. The point does not appear to have been taken at the trial, but, rejecting the written declaration altogether, the case against the prisoner is not weakened.

It was strongly urged by Mr. Duff, on the authority of *Makin* v. *N.S.W.* (1894) A.C. 57, that in case any of the declarations were held to have been wrongly admitted, then

that such admission itself constituted a substantial "wrong or miscarriage," and reliance was placed upon the following language of the Privy Council in the case referred to: "In their Lordships' opinion, substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court, founded merely on a perusal of the evidence."

But it is to be remarked that the statute of New South Wales upon which the Makin case proceeded, and section 746 of the Canadian Code, differ materially. They both provide that the conviction is not to be disturbed, the one simply, "unless for some substantial wrong or other miscarriage of justice," the other expressly, "although it appears that some evidence was improperly admitted or rejected, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial." The Canadian Code expressly requires the Court to ascertain whether the admission of evidence has caused substantial wrong or miscarriage, and, if they find that it has not done so, then bids them not to interfere with the conviction. There is nothing like this in the New South Wales Act.

Being then clearly of the opinion that nothing occurred whereby any substantial wrong or miscarriage was occasioned at the trial, I am of opinion that this appeal should be dismissed and the judgment affirmed.

McCREIGHT, J.—

I think that in this case there may possibly be doubt as to whether the statement made, and, when written, signed by the deceased, on the 4th day of October, as to circumstances connected with his having been shot, was properly received in evidence, inasmuch as it is not clear on the evidence that it was read over to the deceased before he signed it, or rather affixed his mark, or that he understood its contents if read, although I gather from the evidence that his intellect was not then much impaired. Our attention was properly called to the case of *Makin* v. *Attorney-General for New*

South Wales, 6 R. 373, at pp. 379 and 380; and if the language of 746 of our Code had been the same as that of the New South Wales Code or Criminal Law Amendment Act of 1883, I should have felt that there was a very serious question whether we were not bound in strict conformity with the reasons given by the Judicial Committee to decide that there should be a new trial; but the section 746 of our Code, instead of the words of the New South Wales Act, which are, "provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case as stated, unless for some substantial wrong or other miscarriage of justice," contains a very different provision in the following words, "provided that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

Now it seems plain that the Dominion Legislature contemplated the very case of evidence being improperly admitted, etc., as in itself not a sufficient reason for a new trial, "unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial," and the question arises whether, if the dying declaration of 4th of October had not been received in evidence, the jury, having regard to the other evidence, could reasonably have come to a different verdict from that arrived at, so that in the opinion of the Court some substantial wrong or miscarriage had occurred. I don't understand that any complaint is made of the Judge's statement of the case, though his view of the law in reference to dying declarations is questioned, and so I refer to the case stated by him as far as regards the facts:

On 30th of June, 1897, James Woods was tried at Nelson, at a special assize, on a charge of having on 2nd of October, 1896, murdered one Samuel Woods, a blacksmith, by shooting him through the body in his smithy. He was

convicted of the charge, and sentenced to be executed. The evidence at the trial tended to show that the accused was a stranger in Nelson, without money, and without any fixed place of abode. The shooting took place about midnight on Friday, 2nd of October; and from the description given of the accused to the police by the wounded man, the accused was arrested the next evening at Robson, a C.P.R. station, about thirty miles from Nelson. He had been seen in the morning by a driver of a train, when sixteen miles out of Nelson, sleeping alongside of the track, and this fact was at once communicated to the police at Nelson. When arrested a 38-calibre Smith & Wesson pistol, with three chambers loaded and two empty, together with a weapon called a "billy," such as "cracksmen" use, was found on his person. He had no money. The wounded man died fifty hours after he was shot. The bullet, which was extracted from his body, was of the weight and calibre required and used for pistols such as that taken from the prisoner. It, moreover, corresponds in its markings with a bullet fired in the hands of the police for purposes of comparison, from the prisoner's weapon, by an experienced gunmaker.

The evidence as to what occurred immediately preceding the shooting is to the effect that the deceased was heard asking some person outside of his shop what he had been doing in the shop. The person so addressed denied that he had been in it. The deceased then said, "I saw you turn down the light." The deceased thereupon turned the light on. The altercation was heard by the blacksmith's "helper," who lived overhead, and by a Madame Malette, who had just closed her hotel, which is a short distance from the smithy in question. The latter witness, moreover, saw the deceased turn on the light while holding a man "much smaller" than himself, whom she could not more fully describe, as she was about fifty feet from him at the time. She heard the deceased ask the man what business he had there, and saw the man immediately afterwards raise a pistol and fire it at the deceased, and then run away in the direction of the C.P.R. station. Other witnesses saw the

man running in the same direction, but none of them could identify him, owing to the night being very dark. The deceased was visited by Dr. La Bau within a few minutes of his being wounded, and attended to by him until he died. Death, according to the doctor's evidence, was caused by the bullet found by him in the body of the deceased on a *post-mortem*, the bullet being that which I have already referred to.

A minute description of the prisoner, as given by the deceased, was brought out on the cross-examination of Harper, the second witness for the Crown, and it accurately represented him (save as to his hat) as he appeared in court. The remaining evidence for the prosecution consisted of statements proved to have been made by the deceased, which were admitted as dying declarations, inasmuch as it was in the opinion of the Judge satisfactorily proved that, when declarations were made, the deceased was in actual danger of death; secondly, that he knew it; and, lastly, that death ensued from the wound inflicted by the prisoner.

I refer, also, to the evidence given by the witnesses, especially of Malette and Beard, Harper and Miles, which does not seem to have been contradicted or shaken. On the afternoon of Sunday, the 4th, immediately before the taking of the deposition which was objected to, Miles, the constable, was in the room with the deceased, and as to this he is asked on the trial: "Did he (the deceased) say anything about his health?" And the answer was, "Yes, he said he thought he was going to die, and he wanted to have this thing over as soon as possible." Q. "What was this thing?" A. "Taking the deposition objected to." The learned Trial Judge's note is that deceased also said, "Hurry up, I am going to die." Miles then shows that subsequently the prisoner was brought into the room where the deceased lay in bed, and in company with several men in appearance similar to the prisoner, and the deceased pointed to or singled out the prisoner among the others as the man who had shot him, and this was repeated in a manner apparently quite fair, the deceased recognizing the prisoner on the

second occasion as well as the first, as the man who had shot him. The evidence is that the mental condition of the deceased was at the time unimpaired. The statement objected to really contained little or nothing but what was abundantly proved by reliable witnesses, not shaken in cross-examination, and there seems to be no reasonable doubt that "no substantial wrong or miscarriage" was thereby occasioned, and I think there should be no new trial, as I am quite unable to say that "some substantial wrong or miscarriage" was thereby occasioned on the trial. Indeed, I am inclined to think that the evidence was properly received.

DRAKE, J.—

This case comes before us under section 744 of the Code. The learned Judge who tried the case refused to reserve the point as to the admissibility of certain statements of the deceased which were admitted as dying declarations, and in consequence, with leave of the Attorney-General, the matter comes before this Court for consideration under the form of a case stated.

By the case it appears that about midnight on Friday, 2nd October, 1896, at Nelson, the prisoner, James Woods, shot one Samuel Woods, a blacksmith. Dr. La Bau was called in a few minutes after the occurrence, and the deceased said "I am done for," and he described the shooting and gave a description of the person who had fired the shot. Mr. Duff objects that this evidence was improperly admitted, as the words, "I am done for," are of an ambiguous character and insufficient to bring his subsequent statement into the category of a dying declaration, so as to be admissible against the prisoner, and in this he is possibly right. But when the language spoken to by the doctor on this occasion is read, it does not fix the prisoner with shooting; it is a general description of the occurrence by an unknown man. This, before the scope and validity of hearsay evidence was fully understood and reduced by repeated decisions to a more restricted and definite operation,

would have been admissible, and there are authorities, of, however, doubtful force, to this effect. I think it may be said that this was hearsay evidence. But it did not touch the prisoner in any way, and he was subsequently fully described to John Miles, a witness for the Crown, and this evidence was placed before the jury by the cross-examination on behalf of the prisoner. Miles knew the prisoner and had seen him on several previous occasions, and, acting on the information he received from the deceased, arrested him at Robson. The shooting itself was witnessed by Mrs. Malette, who detailed the circumstances. The statement which the deceased made to the doctor on this interview does not appear important, unless some substantial wrong or miscarriage of justice was thereby occasioned. Here we have other evidence, both of the shooting and a description of the prisoner, and, if the whole of the doctor's evidence on this point were eliminated, there is ample evidence without it of the facts he detailed.

Mr. Duff further objects that the exact words of the deceased were not given by the doctor on the subsequent interviews, but after the lapse of eight months it would be difficult to give the exact words. What the doctor says is quite clear and distinct. He says the deceased always expressed himself "That he did not expect to recover." "He was always satisfied that he was not going to recover from his injuries." The doctor says he tried to encourage him, but in spite of his attempts he remained of the same opinion that he was going to die; that he was not going to recover from that shot; that he never changed his conviction, and this conviction was repeated two or three times, and is confirmed by the evidence of Miles, when he stated to him he thought he was going to die, and wanted to have this thing over as soon as possible, referring to the deposition which was admitted in evidence. I think it a sufficient indication of the state of the deceased's conviction of impending death, without any hope of recovery. In the numerous cases cited, the Judges have used various terms to express the same meaning; death must be impending,

immediate, imminent, approaching, but they all insist on the same thing, that the person making the statement must have a firm conviction that there is no hope of present or ultimate recovery; that death is certainly approaching. In *Reg.* v. *Reaney*, D. & B. 151, the deceased made a statement, concluding: "I have made this statement believing I shall not recover;" and on the same day he said, "I have seen the surgeon to-day, and he has given me some little hope that I am better, but I do not think myself that I shall ultimately recover," and the Court of Criminal Appeal held that the evidence was properly received, and Pollock, C.B., there said that it is necessary that the person making the statement should be under an apprehension of death. The question turns upon the state of mind rather than the interval between the declaration and the death. Here we have repeated statements showing a hopeless conviction at all times from Friday night until the death on Sunday night. It is true we are not at liberty to accept the doctor's opinion of the bodily condition of the injured man as showing that his case was hopeless, but the evidence of the doctor was not the expression of his own opinion of the hopelessness of recovery, but the statement made to him by deceased. These statements were made before the written declaration was taken, and before his identification of the prisoner. The identification appears to be complete, and was taken with all due care and precaution to prevent mistake. I think, therefore, that the evidence both of his written declaration and of his identification were properly admitted. It is to be remarked that the identification is much more important as a dying declaration than the written statement.

Mr. Duff strenuously urged that the written declaration was not admissible, because it was not shown that it was read over to the deceased before he signed it; but that it was taken down and read over to him, and that he signed it, was proved by Dr. La Bau, one of the witnesses. The prisoner's counsel at the trial objected to it on the grounds that, being in writing, the Crown could not go behind it, and that it was not made in the presence of the accused or his

counsel, and that there was no *jurat*. No other objection was offered to it, not a suggestion that it was not proved that it was read to him before he signed it. In the case of *Reg.* v. *Mitchell*, 17 Cox 503, it was shown that the statement was extracted by questions and the questions were not put down. There is no evidence of that here.

The other point which was urged, that under section 746, sub-section (*f*), which is as follows: "Provided that no conviction shall be set aside, or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court some substantial wrong or miscarriage was thereby occasioned on the trial", under the authority of *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57, the Court could not be substituted for the jury; the argument being that, if any inadmissible evidence was admitted, its reception vitiated the verdict, it being a matter of speculation whether the jury would have convicted in the absence of the evidence impugned, and to sustain the conviction in its absence is not to uphold the verdict of the jury, but to substitute the verdict of the Court. The language of the clause under the consideration of the Privy Council was "That the Judge by whom a question is reserved shall state the facts and circumstances out of which the question arose, and the Supreme Court may affirm, amend or reverse the judgment, provided that no conviction or judgment therein shall be reversed, arrested or avoided, on any case so stated, unless for some substantial wrong or other miscarriage of justice." The Privy Council points out that evidence improperly admitted might have chiefly influenced the jury, and the rest of the evidence, which might appear to the Court sufficient to support the conviction, might have reasonably been disbelieved by the jury.

The very point which impressed the Privy Council is specially dealt with by the Code (sec. 746 (*f*), "No conviction shall be set aside or new trial directed, although it appears that some evidence was improperly admitted or rejected, etc." The

Court under this section has to deal with the question of admission or rejection of evidence expressly, and will no doubt exercise the gravest caution when such a matter comes up for consideration. In my opinion in the present case the evidence was admissible, and the verdict must stand.

Conviction affirmed.

Note: *Dying Declaration—Admissibility.*

See *R.* v. *Davidson* (N.S.) 1 Can. C.C. 351 and Note to same pp. 362-364.

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WURTELE, J.

THE QUEEN v. CAMERON.

Libel—Indictment—Sufficiency of—Averment that 'likely to injure reputation' or 'designed to insult'—Amendment—Cr. Code 285.

1. An indictment that does not set up in the statement of the charge all the essential ingredients, is defective and cannot be sustained.
2. An indictment charging the publication of a defamatory libel, which does not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, is bad by reason of the omission of an essential ingredient of the offence.
3. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance.

MONTREAL, 13 April, 1898.

WURTELE, J.—

The indictment found by the Grand Jury against the defendant Hugh Blaine Cameron sets up that on the 13th day of July, 1896, at the city of Montreal, he unlawfully wrote and published a certain false and defamatory libel of and concerning one Wm. L. Hogg, in the form of a letter, well knowing

the same to be false and defamatory, to his great prejudice and injury.

This indictment has been demurred to by the defendant, and he asks by motion that it be quashed and set aside :— because it does not set forth and describe any offence against the law, and because it is not averred that the letter was likely to injure Mr. Hogg's reputation by exposing him to hatred, contempt or ridicule, or that it was intended to insult him, but merely concludes that the publication of the letter was to his great prejudice and injury.

Libels are of two kinds : they are either civil or criminal. The first is a statement, either false or malicious, which is of a nature to cause damage to the person against whom it is directed, and the injury inflicted by it gives a remedy by action to the person who has suffered the damage under provisions of Art. 1053 of the Civil Code. The other, or criminal libel with respect to individuals, is defined by Russell (Russell on Crimes, vol. 1, p. 220,) as malicious defamation, tending to blacken the reputation of the person who is attacked and thereby to expose him to public hatred, contempt or ridicule.

A defamatory libel is an indictable offence, not because of the injury which may be done to the reputation of the person against whom it is directed, but because it tends to create a breach of the peace and so to disturb the public tranquility (1 Bishop, § 591). The criminality of a defamatory libel, therefore, depends not upon the damage which it may cause to the person against whom it is directed, but upon its tendency, by exciting the anger of such person, to produce a breach of the peace.

It is the policy of the law to leave the care of men's reputations to themselves, and no damage, therefore, done simply to the reputation of any one by an individual is foundation for a criminal prosecution. There are two remedies for the wrong caused by a libel ; one when the offence is of a public nature as tending to a breach of the peace, by indictment ; and the other when the injury is of a private nature and merely causes damage to the libelled party, by action.

An indictment is the written statement of a charge against

an offender, and it must state such charge in clear and precise language. It must contain the averment of every fact or circumstance necessary to constitute the offence for which the charge is preferred, and it must show clearly some violation of the law. The facts, circumstances and intent which are the ingredients of the offence must be given with certainty, and, in short, an indictment must state every element constituting the crime which it is designed to charge. Should any necessary ingredient of the offence be omitted, such omission vitiates the indictment. It is absolutely necessary that an indictment should contain a substantial statement showing that the person accused has committed an indictable offence, and if any necessary ingredient of the offence should be omitted, the indictment is bad; and when the defendant avails himself of the defect by demurrer or motion, the indictment must be quashed.

When a motion is made to quash for a formal defect, the Court may order the indictment to be amended; but when the motion to quash is founded on the total absence of an essential ingredient, so that the indictment charges no offence in law, it must be set aside and quashed; but in such a case a new bill of indictment may be preferred.

Defects in matters of substance are not amendable, for the very good reason that if there is an omission of the averment of a material ingredient, without which there is no offence known to the law charged against the defendant, then there is no indictment; there is nothing to amend, and the only thing to be done is to quash the defective document and set it aside.

The accusation laid against the defendant in this case is that he published a defamatory libel against Wm. L. Hogg, and thereby committed an indictable offence. It is one of the essential and material ingredients of such an offence that the defamatory libel published is one which is likely to injure the reputation of the person libelled by exposing him to hatred, contempt or ridicule, or that it is designed to insult him. In the present case, therefore, the indictment should have contained an averment to the effect that the defendant

intended to injure Wm. L. Hogg and to deprive him of his good reputation and bring him into contempt, or ridicule and disgrace. This is the formula given by Mr. Taschereau in his excellent commentaries on the Criminal Code. The indictment, instead of containing this averment, simply concludes by stating that the libel which was published concerning Wm. L. Hogg, was written and published to his great prejudice and injury. If the publication of the defamatory libel was of a nature to inflict an injury and cause loss and damage to the person libelled, without, however, exposing him to hatred, contempt or ridicule, or without insulting him, then it would only be a civil wrong for which the remedy would be by action before the civil courts. The averments contained in the indictment merely set out, in direct terms, that Mr. Hogg suffered injury and prejudice by the publication, and therefore only set up a civil wrong and do not show any criminal offence. To make the publication an offence which would be liable to create a breach of the peace, it would be necessary to allege, not that the publication was made to the great prejudice and injury of Mr. Hogg, but that it was of a nature to injure his reputation by exposing him to hatred, contempt or ridicule, or designed to insult him.

The indictment, consequently, does not disclose any offence known to law, and as the defect is one of substance and not merely a formal defect, the indictment cannot be amended.

I therefore quash the indictment and order that the recognizance given by the defendant be discharged.

Indictment quashed.

J. P. Cooke, Q.C., Crown prosecutor.

R. A. E. Greenshields, for the private prosecutor.

R. C. Smith, for the defendant.

Note: *Indictments for defamatory libel.*

Sec. 285 of the Criminal Code of Canada enacts :—

285. A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person to whom it is published.

Note:—*Continued.*

(2) Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

At common law criminal proceedings for libel did not lie "unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community." 1 Hawkins P.C., c. 28, s. 3.

In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual. Ibid.

The criminal remedy for libel is in some respects the more extensive remedy; a libel may be *indictable* though it be not *actionable*. Odgers on Libel, 3rd ed., (1896) 444; *R.* v. *Topham*, 4 T.R. 126; *R.* v. *Gathercole*, 2 Lewin C.C. 237; *R.* v. *Darby*, 3 Mod. 139.

In criminal cases it is not necessary to shew a publication to some third person other than the person defamed, and it is sufficient to prove a publication to the prosecutor himself, provided the obvious tendency of the words be to provoke the prosecutor and excite him to break the peace. *R.* v. *Wegener*, 2 Stark 245; *R.* v. *Brooke*, 7 Cox C.C. 251; *R.* v. *Adams*, 22 Q.B.D. 66, 16 Cox C.C. 544; Odgers on Libel, 3rd ed., p. 455.

A *manuscript* of a libel is deemed prima facie to be published, so far as the writer is concerned, when it has passed out of his possession and control. *R.* v. *Burdett*, 4 B.&Ald. 143; *R.* v. *Lovett*, 9 C. & P. 462.

The directors of a printing company are not criminally liable for a libel contained in a paper printed by the servants of the company, unless they knew of or saw the libel before its publication, or gave express instructions for its appearance. *R.* v. *Allison*, 16 Cox C.C. 559.

Apart from statutory enactments in reference thereto, it was held that the proprietor of a newspaper is answerable criminally for the publication in it of a libel though he has personally nothing to do with the conducting of the paper and

Note :— *Continued.*

leaves its whole management to others. *R.* v. *Walter* (1799) 3 Esp., 21, per Lord Kenyon ; *R.* v. *Gutch* (1829) 1 Moody & Malkin, 433, 438.

And by sec. 297 of the Criminal Code, "Every proprietor of any newspaper is *presumed* to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part."

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE AND TOWNSHEND, JJ., GRAHAM, E.J., AND HENRY, J., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. HAMILTON.

Indictment — Recognisance to prosecute — Attendance before Grand Jury of party bound over—Crown Prosecutor— "Preferring" of Indictment—Motion to quash—Cr. Code, 641, 760.

1. Per McDONALD, C.J., RITCHIE and TOWNSHEND, JJ.—A party bound over by recognizance to prosecute need not personally attend at the sittings of the Court, to prefer an indictment before the Grand Jury unless required to give evidence, and an indictment found in his absence is valid although no order of the Court, judge's consent, or special direction of the Attorney-General, was given to prefer the same.

2. Per RITCHIE, J.—The Crown prosecutor or counsel appointed for the sittings of the Court sufficiently represents a prosecutor so bound over, to validate the preferring of the indictment by such officer, and the same is to be considered as preferred on behalf of the prosecutor.

3. Per WEATHERBE, J., GRAHAM, E.J., and HENRY, J.—The preferring of an indictment by an agent of the Attorney-General acting under a general appointment to attend to all criminal cases at a session of the Court without having obtained the special direction of the Attorney-General or an order or consent under Cr. Code, sec. 641, is not a compliance with Cr. Code, sec. 641, requiring the indictment to be preferred by the person bound over by recognizance to prefer the same, and, if the latter fails to appear, the indictment should be quashed.

ARGUED: November 23, 1897.

DECIDED: January 11, 1898.

On the 2nd of July, 1896, the defendant, Hamilton, was committed for trial by J. W. Johnson, J.P., on a charge of assaulting, wounding and doing grievous bodily harm to one James Wilson. James Wilson was bound over in regular form to prosecute. At the next term of the Supreme Court at Truro, in October, 1896, the grand jury found an indictment against said Hamilton. James Wilson was not present at said term and was not examined as a witness. The Attorney-General was not present, and no one had any special direction from the Attorney-General to prefer an indictment. No one had the written consent of a judge, and no order of the Court was given to prefer an indictment.

At the trial on the 8th October, 1896, before Henry, J., the learned judge reserved, at the request of prisoner's counsel, as a Crown case reserved, for the opinion of the Supreme Court *in banco*, the question whether the indictment should not be quashed, and the conviction thereon held to be illegal, on the ground that it was not preferred by any of the persons authorized by sec. 641 of the Criminal Code of Canada. That section is as follows:

641. Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the Court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the Court shall quash such count if satisfied that it is not so founded. And if at any time during the trial it appears to the Court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the Court may then quash such count and discharge the jury from finding any verdict upon it.

(2.) The Attorney-General or any one by his direction or any one with the written consent of a judge of any Court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any Court specified in such consent; and any person may prefer any bill of indictment before any Court of criminal jurisdiction by order of such Court.

(3.) It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

(4.) Save as aforesaid no bill of indictment shall after the commencement of this Act be preferred in any Province of Canada.

F. T. Congdon, for prisoner. Criminal Code, s. 641, sub-sec. 2 and 4. (GRAHAM, E.J.—The prosecutor was there by his solicitor, the representative of the Attorney-General.) That would apply only to the conduct of the case before the petit jury, but the preferring of the indictment before the grand jury is an entirely different matter. (TOWNSHEND, J.—Was this objection taken before the trial? If not, it is not open to you.) Only the person who is bound over to prosecute can prefer the indictment. Taschereau Crim. Code, p. 661; *Regina* v. *Hargreaves*, 2 F. & Fin., 790; Crankshaw Criminal Code, 528; *Ex parte Wason*, 38 L. J. Q. B., 302.

J. W. Longley, Attorney-General, contra.—The clause which s. 641 of the Criminal Code takes the place of is R. S. C. c. 174, s. 140, under which the prosecution went on as a matter of course, and the defendant was committed for trial. The prosecutor was present by counsel which was a compliance with the Act. No safeguards are required once the party has been committed for trial. The prosecutor can always rely on being represented by counsel.

F. T. Congdon, in reply, referred to Cr. Code, sec. 598, sub-sec. 5; Taschereau's Criminal Code p. 660. Such a thing is unknown in criminal law as for a principal to appear by an attorney.

HALIFAX, January 11, 1898.

TOWNSHEND, J.—

The point reserved is whether this indictment should not be quashed because not preferred by any of the persons authorized by Section 641 of the Criminal Code. From the statement of the learned judge it appears that at the trial, on the 8th of October, 1896, he reserved the question. By the section referred to, such an objection must be taken "at any time before he is given in charge to the jury," "and the Court shall quash such count if satisfied that it is not so founded." As there could be no doubt in the mind of the judge on such a point, if taken at the proper time, I assume his difficulty must have been whether, after the trial had commenced and the prisoner was given in charge, he could give effect to it. I am very clearly of opinion he was right in not doing so.

Assuming, on the other hand, the objection to have been made at the proper time, I am unable to say, from the facts submitted, who did "prefer"—that is to say, carry on—the proceedings which resulted in the prisoner's conviction. It appears from the statement that James Wilson, who was bound over to prosecute, did not attend, nor give evidence. I can find no law or statute making it necessary that he should do either, unless his testimony was necessary, in which case he could be proceeded against for not doing so. It also appears the Attorney-General was not present, and that no one had any special directions from the Attorney-General to prefer an indictment. It was not necessary that the Attorney-General should attend, nor was it necessary that he should give any special directions to prefer an indictment. Our Provincial Statute enables the Attorney-General to appoint a barrister to carry on all Crown prosecutions in his absence, at each term of the Court, in every county of the province, and if he neglects to do so, then it becomes the duty of the presiding judge to appoint a barrister for that purpose. I am bound to assume, in the absence of information, and from the fact that the prosecution was carried on, that it was carried on by a barrister appointed either by the

Attorney-General or by the judge who presided. As I understand the law of criminal procedure, all public prosecutions must be carried on, and only be carried on, by the officers of the Crown. There is no such thing as a private prosecution in offences against the public. Section 641, in my opinion, makes no difference in this respect. The party bound over is the moving spirit, no doubt, in instituting the proceedings before the magistrates, but he may or may not give evidence, and his presence before a grand jury, where he is not required to give evidence, would be utterly immaterial. It might be that he was sick, or unable from some other cause, to attend at the term of the Court when the grand jury found an indictment, but it would be an unreasonable conclusion to draw from the statute that, because he was not present in *propria persona*, the charge could not be sent before the grand jury. He knows, by the law and procedure of the Court that all depositions containing charges of a criminal character are, in the first instance, placed in the hands of the judge, who submits them to the grand jury, without any reference to his presence or absence, and who, at the same time, instructs them whether to find an indictment or not. He also knows that the Attorney-General, or his appointee, or a barrister appointed by the presiding judge, prepares the indictment, carries it before the grand jury, subpœnas the witnesses, and sends them before the grand jury. He knows that this officer conducts the trial, and attends to every matter connected therewith, and is paid by the Government for his services. Knowing all this to be the law, unless, as I said before, he is required to give evidence, in what respect is his actual physical presence necessary?

As I understand Section 641, its object was to prevent, except as therein provided, persons going before the grand jury and preferring charges without the facts having been first investigated on a preliminary inquiry before the magistrates. Such was a common practice, and a very objectionable one. Section 641 guards against this abuse by laying down certain very stringent provisions, but, I apprehend, it never occurred to Parliament that the prosecutor must

actually appear in Court, in his own person, or by his own solicitor, to do what is called "preferring an indictment." Indeed, the words "prefer an indictment" have little or no application to criminal proceedings in the country, in this province, owing to Section 760 of the Code, the effect of which would seem to be, where depositions have been taken, that the grand jury directs whether an indictment shall be preferred or not, except in Halifax.

'I am therefore of opinion this conviction must be confirmed.

McDONALD, C.J., concurred.

RITCHIE, J.—

Section 641 of the Criminal Code provides that any one who is bound over to prosecute may prefer an indictment, that is, 'bring in' or 'offer' an indictment to the grand jury for their consideration.

The prosecutor is not obliged to do this personally, but he may prosecute by attorney, and if there is one in court acting on his behalf who presents an indictment to the grand jury, the condition of his recognizance would be performed and it could not, I think, be estreated, because he was not personally present in court.

In this province, crimes such as the one for which Hamilton was indicted, are not prosecuted by an attorney, or counsel appointed by the prosecutor, but by an officer or public prosecutor, appointed by the Attorney-General at each term of the Court, or by the Court, and at the public expense. This officer, in my opinion, represents and acts for all prosecutors who have been bound over to prosecute criminals at the term for which he is appointed. If the indictment in this case was preferred by this officer, as was admitted on the argument but not stated in the case, it was, I think, preferred by and on behalf of the prosecutor, although he was not personally present; and no special direction from the Attorney-General or written consent of a judge, or order of the Court, was necessary to make the indictment valid.

I have a good deal of doubt whether Section 641 is applicable to the procedure before the grand jury in any county of Nova Scotia except Halifax.

Section 760 of the Code provides that, in the province of Nova Scotia, a calendar of the criminal cases shall be sent by the Clerk of the Crown to the grand jury, in each term, together with the depositions taken in each case, and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the grand jury so directs.

Under that section, it seems to me that no indictment can, strictly speaking, be preferred by any one to or before the grand jury; the inquiry, which may or may not lead to an indictment, is set in motion by the Clerk of the Crown, and the indictment itself must emanate from the grand jury itself, and be prepared in accordance with their directions.

In my opinion, the indictment should not be quashed nor the conviction set aside.

GRAHAM E. J.—

The language of sec. 641 of the Code, is very clear. First it enumerates all those who may prefer a bill of indictment, and then it says that no one else may do so. It is different in this respect from the English provision, 22 and 23 Vic. c. 47. Now, the bill was not preferred by any of those enumerated; it was preferred by a general agent of the Attorney-General, acting under the provincial law, whose authority was not sufficiently specific to bring it within this provision of the Code. He had not been bound over to prosecute. There had been a person bound over to prosecute, but he did not prefer the bill. This is a good ground for quashing the indictment. *Queen* v. *Abraham*, 6 Can. S. C. R. 10; *Reg.* v. *Fudge*, 9 Cox C. C., 430. But it is contended here that there was agency; that the person who did prefer it must be held to be the agent of the person who was bound over. There is no express authorization or agency in fact.

It seems to me to be carrying construction very far. Under the Code there are provisions for persons being bound

over to prosecute, and give evidence, and to prosecute without giving evidence. And this sec. 641 is a provision to prevent vexatious indictments. The accused has a right to know who his prosecutor is. He may wish afterwards to bring an action for malicious prosecution against the person who prefers a bill against him before the grand jury. Now, I do not think that the recognizance to prosecute is satisfied merely because an agent of the Attorney-General was there to prosecute.

There is a statute in England providing that if the director of public prosecutions undertakes the case, the prosecutor shall be released from his obligation. See *Stubbs* v. *Director of Public Prosecutions*, 24 Q. B. D. 577. But we have no such Act. And these recognizances mean something; *Reg.* v. *Hargreaves*, 2 F. & F., 790. The prosecution may have gone on upon the supposition that there was specific authority from the Attorney-General to this agent sufficient under the 641st section. And it seems hardly fair to say if that fails, then he was agent for the person who had been bound over; that the bill was preferred by the prosecutor, and that he would be liable for malicious prosecution if that action were brought.

The fact that the Attorney-General, under a provincial Act, may appoint counsel to attend to all the cases at the court does not conflict with the requirement of sec. 641, and the defendant is entitled to its protection.

It is true that, in a portion of the province outside of Halifax, the grand jury, before any bill is prepared, investigate the charge, and direct as to whether there is to be one or not. But there still must be some one who prefers the bill, as in England.

I think the conviction ought to be quashed.

HENRY, J. concurred.

WEATHERBE, J.—

Sections 640 to 648, inclusive, of the Criminal Code of Canada, 1892, deal with "preferring the indictment."

Sec. 641 provides, in the first part of the section, that any one who is bound over to prosecute any person (James Wilson in the case before us), "may prefer a bill of indictment for the charge on which the accused has been committed," or "any charge founded on facts or evidence disclosed in the depositions," and an indictment or count not founded on such facts may be quashed.

Then, in the second clause the section proceeds:—

"The Attorney-General, or any one, by his direction, or anyone with the written consent of a judge of any Court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent; and any person may prefer any bill of indictment before any Court of criminal jurisdiction by order of such Court."

The third clause of the section says:—

"It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge."

The language of the fourth clause of this section is important:—

"Save as aforesaid no bill of indictment shall be preferred in any province of Canada."

Wilson, the learned trial judge reports, was bound over in the regular form to prosecute. At the next term Wilson was not present, and was not examined as a witness.

The Attorney-General was not present and no one had any special direction from him to prefer an indictment. There was no written consent of a judge and no order of the Court was given to prefer an indictment.

I shall assume that, as Wilson is reported not to have been present, he was not present by counsel or solicitor.

An indictment, however, on the charge for which Wilson was bound over to prosecute, was found by the grand jury, and, on a motion to quash the same, the judge declined to do so, but reserved the question whether the same should not have been quashed on the ground that "the indictment

was not preferred by any of the persons authorized by sec. 641 of the Criminal Code."

It must be assumed that the prosecutor preferred no bill of indictment. No indictment was preferred by the Attorney-General, and I will assume that as there was no direction from him to prefer an indictment in this particular case, such indictment was not preferred under the direction of the Attorney-General.

And as there was no consent of a judge, and no order of the Court, I must conclude the indictment in question was preferred in violation of the provisions of the 641st section of the Code, and should, under the provisions of that section, have been quashed.

There is nothing to prevent the indictment from being preferred according to the provisions of the Code. Crim. Code, sec. 641, sub-sec. 2 and 4; Taschereau's Crim. Code. p. 661; *Regina* v. *Hargreaves*, 2 F. & Fin. 790; Crankshaw's Crim. Code, 528; *Ex parte Wason*, 38 L.J.Q.B., 302; R. S. C., c. 174, sec. 140; Crim. Code, sec. 598, sub-sec. 5; Taschereau, Crim. Code, p. 660.

[COURT OF QUEEN'S BENCH, QUEBEC.]
(CROWN SIDE.)

BEFORE WURTELE, J.

THE QUEEN v. LALONDE.

Juror—Peremptory challenge—Withdrawal of—Trial on joint indictment—Number of peremptory challenges by prosecution—Cr. Code, 667 (4), 668, 671.

1. A peremptory challenge of a juror when once taken must be counted against the party making it, and cannot be withdrawn when the panel is being called over a second time.

2. Where several persons are jointly indicted and tried, the Crown is restricted to the number of peremptory challenges allowed on the trial of one person.

MONTREAL, March 9, 1898.

WURTELE, J.—

In proceeding to form the jury the panel was exhausted by challenges and directions to stand by without the jury having been formed, and the clerk of the Crown is now proceeding to call the jurors who have been stood aside. Joseph Lalonde, one of the prisoners, has declared that he withdraws the peremptory challenge which he made against Athanase Hébert, one of the jurors on the panel, but Mr. Desmarais, one of the Crown prosecutors, objects to the withdrawal of the challenge, contending that it cannot be done legally.

Every one indicted for an offence punishable with death is entitled to challenge twenty-four jurors peremptorily, and the Crown has the power to challenge four jurors peremptorily, and may also direct any of the jurors not peremptorily challenged by the accused to stand aside until the panel had been called over. To order a juror to "stand by" is virtually to challenge him for cause, postponing however the consideration of the challenge till it has been seen whether a full jury can be formed without him. Both the Crown and the accused

are entitled to any number of challenges for cause. When the panel has been called over without a jury having been formed in consequence of challenges and directions to stand by, the jurors who have been directed to stand by are called again in the order in which they were drawn, and then, as each juror again appears, he may be challenged by the accused, or the Crown may shew cause against him. If not challenged peremptorily, or if no sufficient cause of challenge is shewn he is sworn.

In the present case, the prisoner Joseph Lalonde asks to be allowed to withdraw his peremptory challenge against the juror Athanase Hébert, and both prisoners insist that he should be sworn on the jury which is being formed to try them.

The question I am called upon to decide is whether a peremptory challenge once taken, must be definitively counted against the party who made it and cannot be withdrawn when the panel is called over a second time.

The Criminal Code, sec. 667 (4), directs that when the panel has been exhausted, only the jurors who had been directed to stand by, and such other jurymen as have since become available, shall be called and may be sworn on the jury.

It appears very clearly from this direction that a challenge once allowed excludes a juror from serving on the jury being formed; and the grounds on which this rule is founded are obvious. In cases of a peremptory challenge the other party might afterwards exhaust his peremptory challenges and the privilege of withdrawing it might therefore operate as a fraud upon him. Then in the case of a challenge for cause the withdrawal of the challenge would not change the decision of the triers that the juror did not stand indifferent, and that he, therefore, was an improper person to serve on the jury.

It must not be forgotten that the right of challenge is a right merely to reject, and it should not be converted from such a right to reject into the right to select. The right to say who shall not try the case is all that the privilege of challenging confers. It enables the prisoner to say who shall not, but not who shall try him. In the treatise of Thompson

and Merriam on Juries we find in par. 277 the following lines: "A peremptory challenge once taken is counted against the party and he cannot capriciously withdraw it. It is clear that the prisoner having challenged a jury peremptorily cannot subsequently withdraw such challenge and insist that he shall sit upon the jury, or substitute a challenge for cause, the grounds of which came to his knowledge after the peremptory challenge had been taken."

This dictum conforms exactly with the prescriptions of the Criminal Code and gives in plain language the answer to the question before the Court.

I hold that a peremptory challenge once taken, and counted, cannot afterwards be withdrawn; and I consequently disallowed the application made by the prisoner Joseph Lalonde to be allowed to withdraw his peremptory challenge against Athanase Hébert.

Pierre Dansereau, a juror on the panel, when called, was ordered to stand by. He has been called again and Mr. Desmarais, one of the Crown prosecutors, has declared that the Crown challenges him peremptorily. He alleges that the Crown is entitled to four peremptory challenges for each of the two prisoners at the bar, while the counsel for the prisoners contest this proposition and contend that although persons who are jointly indicted and tried, are each entitled to the same number of peremptory challenges as if they were tried alone, the Crown is only allowed its original number of four peremptory challenges.

Article 668 of the Criminal Code gives the Crown the power to challenge in any trial four jurors peremptorily, and enacts that every one is entitled, when indicted for any offence punishable with death, to twenty peremptory challenges; when indicted for an offence which is not punishable with death, but for which he may be imprisoned for more than five years, to twelve peremptory challenges; and when indicted for any other offence, to four peremptory challenges.

Then article 671 specially declares that when it is proposed to try several accused persons together, they may join in their challenges or each may exercise his right separately and in the same manner as if he were tried alone. Under these provisions of the Criminal Code, each defendant has a right to the full number of his peremptory challenges; but a corresponding privilege is not given to the Crown, and therefore the Crown is restricted, in the case of the trial of several defendants jointly, to the number of peremptory challenges allowed to it in the case of the indictment of a single person. But if the joint defendants refuse to join in their challenges, the Crown has the right to try them separately, and then the Crown has its four peremptory challenges at the trial of each defendant.

There is therefore a marked difference in the position of the parties with respect to their peremptory challenges; the Crown, on the one hand, as the prosecutor, is only allowed to challenge in any case four jurors peremptorily, while, on the other hand, when several accused persons are tried jointly, each of them is entitled to the number of challenges which is granted to a defendant who is tried alone.

In Thompson and Merriam's Treatise on Juries, in paragraph 162, we find the following passage which succintly gives the rule:—"In the case of persons jointly indicted and jointly tried, although the defendants may be permitted severally to challenge jurors peremptorily to the statutory number, this does not increase the right of challenge on the part of the prosecution. The State is restricted to the number of peremptory challenges allowed in the case of the indictment of a single person."

The Crown has exhausted its four peremptory challenges in this case, and the peremptory challenge against Pierre Dansereau is therefore disallowed.

J. P. Cooke, Q.C., & Odilon Desmarais, for the Crown.
A. E. Poirier, for the prisoner Lalonde.
E. N. St. Jean, for the prisoner Deguire.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROBERTSON, J.

THE QUEEN v. PONTON.

Change of venue—Application for by Crown on ground of popular sympathy for accused—Opinion evidence insufficient—Cr. Code 651.

1. A change of venue should not be made in a criminal case whereby the trial would be transferred from the county in which the crime is alleged to have been committed, unless facts are proved, as distinguished from sworn opinions, plainly indicating, that a fair and important trial cannot be had in that county.
2. A change of venue should not be granted on the ground of popular sympathy with the prisoner and prejudice against the prosecution, where there is nothing to show that the class of citizens from whom the jury would be drawn are likely to be prejudiced except by those feelings which arise from the nature of the offence and which are common in all counties.

ARGUED: September 30, 1898.
DECIDED: October 7, 1898.

A motion by the Crown for a change of venue.

The defendants, Ponton, Mackie, and Holden, had been committed by the police magistrate for the town of Napanee to stand their trial at the next Court of Oyer and Terminer and General Goal Delivery to be holden at Napanee, on a charge that they did, unlawfully, on or about the 27th August, 1897, at the town of Napanee, break and enter the Dominion Bank, and did steal, take, and carry away a quantity or sum of money, to wit, $33,000, the property of the Dominion Bank, contrary to the statute, etc.

The motion was made under sec. 651 of the Criminal Code, 1892, which section is a re-enactment of sec. 11 of 32 & 33 Vict. ch. 29 (Can.), and is as follows:

"Whenever it appears to the saisfaction of the court or judge * * that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county, or place other than that in which the offence is supposed to have been committed,

or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county, or place within the same Province, named by the court or judge in such order. * * ."

It appeared by the affidavits filed in support of the motion that the defendant Ponton had been arrested once before on a charge similar to the present one, and in respect of the same offence, in October, 1897, but, after an investigation before the police magistrate for the town of Napanee, was discharged, and thereupon brought an action against the Dominion Bank and others for false imprisonment, malicious prosecution, wrongful dismissal, and slander. The venue in that action was laid at Napanee, but, on the application of the defendants therein, was changed to Cobourg. Mr. Deroche, one of the solicitors for the defendants in that action, made an affidavit in support of the present motion, in which he stated that the reasons which then caused the change of place of trial from Napanee, in his belief, still existed, and "that there is still the greatest sympathy shewn on behalf of the accused Ponton, so that, in my opinion, a fair trial cannot be had at Napanee before a jury of the county of Lennox and Addington." At the date of the present application, the action against the bank was still pending, but had not been tried.

Mr. Aylesworth, Q.C., who was counsel for the bank upon the motions which resulted in a change of venue in the action referred to, also made an affidavit, in which he stated that, while he was still interested in that action as counsel, he was in no way interested in the prosecution of these defendants; that he spent a large portion of the recent long vacation in and about Napanee; that he was born in the county of Lennox and Addington, and had a large acquaintance there; that during his recent sojourn there he heard a great number of people express their views and opinions upon and about

these criminal proceedings, and he unhesitatingly said that, in his opinion, the sympathies of the people of the county had been so aroused in favour of the accused Ponton and Mackie that it would be impossible to obtain a fair trial before a jury taken from such county.

George A. Aylesworth, a justice of the peace for the county of Lennox and Addington, said on affidavit that so far as his acquaintance extended (and he had an extensive acquaintance in and about Napanee) nearly every person qualified to act upon an assize jury in the county of Lennox and Addington had reached a declared conclusion in respect of the guilt or innocence of the accused; the position of the accused has been the favourite topic of discussion ever since the arrest of Ponton; and he believed that such a strong prejudice existed in favour of Ponton that it would be impossible to obtain a fair trial before a jury selected in the ordinary way in the county of Lennox and Addington.

James Teskey, a justice of the peace for that county, swore that from discussions heard by him from time to time since the arrest of the accused, he believed the general public in the county were strongly prejudiced in favour of the accused, "and that it would be impossible in the county of Lennox and Addington to select a jury in the ordinary manner that would look upon any evidence adduced in an impartial manner."

Charles Edward Clancy, another justice also made an affidavit in which he said that his belief was that so strong a prejudice in favour of the accused Ponton existed in the county that it would be impossible to obtain a fair trial before a jury selected in the ordinary way from the county.

Sidney E. Scott, a farmer, who was a witness for the Crown at the preliminary examination, swore that during that investigation, and since, he had had a great many opportunities of ascertaining the views and opinions of the people of Napanee and surrounding country upon the proceedings, and, in his opinion, there was in Napanee, and to a certain extent also in the surrounding country, such a strong prejudice in favour of Ponton and Mackie that it would be impossible to obtain a fair trial before a jury in the town of Napanee.

John Livesley, assistant constable and doorkeeper at the preliminary examination, said in his affidavit that the greatest sympathy was shewn for the accused Ponton and Mackie, and he frequently heard, in and about the court house and in the town, statements to the effect that the officers of the law and the detectives engaged in the prosecution had resorted to improper and corrupt methods in their efforts to obtain evidence against the accused, and from this and other causes he believed such a strong prejudice had been created against the prosecution and in favour of the defence that it would be impossible to obtain a fair trial before a jury in Napanee.

Edwin H. Sills, High Constable for the county of Lennox and Addington, by his affidavit verified certain newspapers which he said had a large circulation in the county and which contained reports of or references to the proceedings at the preliminary examination. He also said that "during the time of the preliminary investigation the evidence was most freely discussed upon the streets of Napanee and in and about the hotels, and the prevailing topic of conversation was the proceedings before the police magistrate; such prominence was given to the subject in the newspapers that, so far as I can learn, the matter was the absorbing topic of conversation in the surrounding county; the greatest sympathy was shewn for the accused Ponton and Mackie; and it was no uncommon circumstance to hear statements made in the court room, upon the streets, and about the hotels, insinuating that the officers of the law engaged in the prosecution were deliberately making attempts to procure false evidence on behalf of the prosecution; and the prejudice against the officers of the law and in favour of the accused Ponton and Mackie, is such that I do not believe that a fair trial could be had before a jury in the Town of Napanee."

Mr. F. B. Osler made an affidavit verifying some extracts from Napanee newspapers of a recent date containing references to this criminal cause, in one of which it was stated that "a leading citizen of Napanee, whose judgment should carry weight, thinks Ponton's chances of being honourably acquitted are brightening daily."

Mr. Herrington, acting Crown Attorney for the county of Lennox and Addington, also made an affidavit in which he verified the information laid against the accused, and also one of the newspaper extracts referred to in Mr. Osler's affidavit; but he did not express any opinion on the question of fair trial.

In answer to the affidavits produced by the Crown, seventeen affidavits were filed on behalf of the accused Ponton and Mackie, seven of which were made by persons residing in the town of Napanee, one in the village of Odessa, and nine in six of the ten townships.

From one of these affidavits it appeared that the county of Lennox and Addington extends from the bay of Quinte on the south, northerly over one hundred miles, and varies in width from ten to twenty-five miles, and consists of thirteen municipalities, made up of one town (Napanee) two villages, and ten townships, and has a population of upwards of 39,000.

The purport of all the affidavits filed on behalf of the accused was that public opinion in the county as to the guilt or innocence of the accused was divided or conflicting, and not settled or unanimous, and that the men of the county from whom jurors would be selected were persons who would be influenced only by the evidence and not by any other consideration.

The motion came on for hearing before ROBERTSON, J., in Chambers, on the 30th September, 1898.

L. G. McCarthy, for the Crown, asked for an enlargement to enable him to file affidavits in reply.

C. J. Holman, for the defendant Mackie.

Wallace Nesbitt, for the defendant Ponton.

W. E. Middleton, for the defendant Holden.

ROBERTSON, J.,—

I refuse the enlargement on the ground chiefly that if the Crown should be allowed to file futher affidavits of the same character, the accused might properly ask for the same privi-

lege, and it would come to be a question of who could procure the greater number of affidavits, which would work a great injustice to the accused in regard to expense.

The motion was then argued by the counsel above mentioned.

TORONTO, October 7th, 1898.

ROBERTSON, J.,—

I am aware of but one application for this kind having been made in Ontario since 1869, and I know of none before that. There is no such case reported. But in April, 1880, a similar application was made by the Crown in what was known as the "Biddulph Murder Cases", *Regina* v. *Carroll et al.*, at the London Assizes, before the late Sir Adam Wilson, Chief Justice, who was Judge of Assize. And I am referred to that case and the facts there set out, as instructive. In that case the motion was refused, and the matter was aftewards brought up by *certiorari*, etc., before the Court of Common Pleas, in May, 1880, and resulted in the same way. I have had the advantage of perusing all the affidavits and proceedings before both the Courts, and the printed judgment of the Chief Justice as Judge of Assize. The full Court did not give a written judgment, but, after hearing counsel, etc., determined that there was not sufficient evidence to satisfy the Court that it was expedient to the ends of justice to order a change of place of trial.

The same question is before me.

The English and Irish authorities which I have been referred to, make it clear, in my judgment, that there is no rule better established than that all causes shall be tried in the county where the crime is supposed to have been committed, and that the rule ought never to be infringed unless it plainly appears that a fair and impartial trial cannot be had in that county. It will not do to swear generally to apprehension and belief—opinion evidence is not to be relied on; there should be such facts shewn as will satisfy the conscience of the Court or Judge.

Now, the question is whether such a state of things as is shewn here should satisfy any Judge that a fair and impartial trial cannot be had of these accused persons at Napanee.

There are seventeen affidavits in all filed by the accused against this application, seven of which are made by persons residing in the town of Napanee, one in the village of Odessa, and nine in six of the ten townships, which, to my mind, being made as they are by men all in responsible and most respectable positions throughout the county, and men who have been residing there for a great many years, several of them for from forty to fifty years, and no one of whom has any interest in the accused, deserve and are entitled to consideration, and must of necessity impress seriously the mind of any Judge who has to dispose of this matter, and, in my judgment, overwhelm the statements made in the affidavits filed on behalf of the Crown.

Taking into account, then, first, the *primâ facie* right that the accused have to be tried in the county in which the crime charged is supposed to have been committed; second, that John Livesley and Sidney Scott confine their opinions to the result of a trial before "a jury in the town of Napanee," and say nothing as to the result of a trial by a jury selected from the county at large; third, that the opinion of Mr. George Anson Aylesworth, J.P., is confined to the result of the trial in case the "jury should be selected in the ordinary way in the county"; fourth, that the affidavit of Mr. Charles Clancy states no facts as to how he has come to form the opinion that "it would be impossible to obtain a fair trial before a jury selected in the ordinary manner from the said county," and confines his opinion to that manner of selecting a jury in this case; fifth, that Mr. James Teskey in his affidavit makes the bald statements that from the "discussions he has heard from time to time, since the arrest of the accused, he believes the general public are strongly prejudiced, etc., and it would be impossible to select a jury in the ordinary manner," without stating with whom or between whom these discussions took place, so as to warrant him in characterizing jurymen selected, even "in the ordinary manner,"

as being regardless of their oath as jurymen, and also confines his opinion to what a jury so selected might do: I feel that I would have great difficulty in giving way to the application, on the ground that such affidavits, as well as the others filed do not altogether make out such a case as would warrant me in depriving the accused of what is their *primâ facie* right. And, besides all this, there is not a particle of evidence in support of the motion so far as the accused W. H. Holden is concerned, and as weak as it is as regards the accused W. H. Ponton, it is still weaker against Mackie; but, however that may all be, the affidavits in answer make it impossible for me to say that I am satisfied that the trial of the accused should be in some district, county, or place other than at Napanee.

It is not necessary to consider the point taken by Mr. Middleton, on behalf of Holden, that there is not a tittle of evidence to warrant his trial being held out of Napanee; it has not come to that; but had a case been made out for a change in regard to Ponton, whose position seems to be the one which the Crown is chiefly concerned about, I may mention in passing, that it might be difficult to determine that even then Holden should be deprived of his right; and, if not, there would be a severance, the effect of which would also have to be taken into account.

When it considered that the county of Lennox and Addington is one of the oldest, and peopled for the most part by respectable, intelligent, and well-to-do farmers, men of independent mind; that the Crown has rights far in excess of the accused in selecting the jurors to form the jury at the trial; that under the Jury Act, R.S.O., 1897, ch. 61, sec. 67, any additional number of petit jurors may be directed to be returned either by the trial Judge before or at the time of the sittings of the Court, or by the County Court Judge at any time before the sittings; and that the county has a population of at least 39,000 from which the jury may be selected; I cannot see how the Crown is likely to be prejudiced in the trial of this case.

In *Regina* v. *Carroll et al.*, before referred to, the facts and reasons submitted, first to the trial Judge, and afterwards to the full Court, were, in my opinion, much more cogent for a change than those here presented; yet both tribunals refused to grant the application. Sir Adam Wilson, the Judge of Assize, in his judgment said:

"In determining this question I am not acting under a common law power, but am exercising a strictly statutory jurisdiction. And on this motion the Crown and the prisoner stand upon equal ground; there is no prerogative or privilege to be considered * * . To effect a change of venue, or, more correctly, to change the place of trial, the Court must be specially moved for he purpose; it does not rest with the Crown to select the place for trial by suggestion or otherwise, as it may desire. And the Court will refuse or grant the motion as it may see fit. But it will be granted when there is a reasonable probability that a fair and impartial trial cannot be had in the place where the cause would otherwise be tried. That there is a very great feeling and excitement in this county over these impending trials is, in my opinion quite clear, arising from the magnitude of the crime (but that would operate *primâ facie* adversely to the prisoners), arising too, from the motive which impelled the parties engaged in these acts to commit them, the motive assigned being to put down a turbulent set of lawbreakers, and it is believed that such a purpose, good in itself, is approved of or is not condemned, although effected by the most violent and unlawful means. That there is much force in this statement is true, and particularily in and about the locality where these acts happened, and where the prisoners reside, and arising also from the counter-feeling entertained against the unfortunate family who were massacred, and upon whom were laid all the sins of the neighborhood. There is also much truth in this ground. But whether these matters will stand in the way of a fair and impartial trial being had in this county is nevertheless the question. The county is very large and populous. It can scarcely be that in such a county, with the perfect means there are for sifting and selecting the twelve

men to be ultimately chosen who are to pass upon the case, that a panel of disinterested and impartial jurors cannot be procured. It may be also that the same reason which it is believed may or will operate here to prejudice the trial, will equally apply if the place of trial be changed to another county, because the like publication and comment in the public press which have been made here, have been made in the other counties in the Province, so that every particular of this extraordinary case, and all that has been published about it, have found their way into every settlement and family in this Province and far beyond it * * . But to justify me in making the change asked for, I must be satisfied that it is expedient to the ends of justice that it should be so changed, and I cannot say that I am satisfied that it is clearly made out that there is a fair and reasonable probability of partiality or prejudice in the jurisdiction within which the indictment would otherwise be tried: Archbold's Pleading and Evidence in Criminal Cases, 18th ed., p. 100."

Now, apart from the motive of the crime charged, the reasoning above set forth applies with equal force in this case, with this difference, however, that the cause of all the sympathy which has created the anxiety of the prosecution, is on behalf of a young man, a bank clerk, who is hardly known outside of the town of Napanee, so far as the county of Lennox and Addington is concerned; and he belongs to a class who do not, as a general thing, mix among the class of men in the county from which a jury would be empannelled; and, therefore, if there is any sympathy created on his behalf, I cannot believe that it exists to such an extent as to affect the minds of such men as the Crown, with its rights, cannot guard against being empannelled to try the case.

The affidavits on behalf of the Crown shew that, so far as the public press is concerned, the whole of the evidence and such comments as have been made thereon, have been sent broadcast through the press into every settlement and family in this Province.

I think in this case, however, as Sir Adam Wilson thought in *Regina* v. *Carroll et al.*, that the Crown prosecutor has

done that which he was bound to do, in the interest of the public, and, so far as the learned counsel who appeared for the Crown before me is concerned, I can say he has done so with sound discretion. The accused have the legal right to be tried in Napanee, and, whatever that right may be worth, I have not the power to take it from them unless I have the sanction of the law, and that sanction I do not think I have on this occasion.

In *The King* v. *Holden and another* (1833), 5 B. & Ad. 347, an indictment found at Suffolk Lent Assizes, 1833, on a charge of felony preferred in September, 1832, was removed into the King's Bench by *certiorari*, and a motion made to award a *venire* into another county, on a suggestion that a fair trial could not be had in Suffolk; in support of which application many affidavits were put in, sworn in the Autumn of 1832 shewing that a strong prejudice existed in Suffolk against the defendants, on the subject of this charge. The Court held that there was not sufficient grounds laid for removing the indictment from the body of a large county, and discharged the rule. The case was very fully and exhaustively argued by Byles, who shewed cause, and by Sir James Scarlett and B. Andrews, contra. The Court was Denman, C. J., Littledale, Parke, and Patterson, JJ. Denman, C. J., in his judgment, referred to the alleged prejudices, etc., and to the power of the court at that time (1833), he said:

"I apprehend that the power of changing the place of trial whenever it is necessary for the purpose of securing as far as possible a fair investigation, is a part of the jurisdiction of this Court; and that that power may be exercised where it is absolutely necessary, in cases of felony. Instances have occured in which this has been done for the purpose of removing the trial from limited jurisdictions; but there does not appear to be any in which it has been done with respect to a county at large: and I should think such a proceeding could not be necessary where the removal must be from one great county to another * * . There is nothing to shew that the great body of freeholders and others, out of whom the jury would be formed, are likely to be prejudiced, except by those feelings which

arise from the nature of the offence, and which are common to all counties. When men are summoned into a jury box to decide upon a case of felony, such prejudice is very apt to die away : it is a kind of feeling which juries are learning more and more to lay aside ; and we should rather relax that disposition by being too ready to suppose that they would be influenced by unjust impressions."

The other members of the Court concurred.

I have also referred to and considered the following English and Irish cases : *The Queen* v. *Phelan* (1881), 14 Cox C.C. 579, where the place of trial was changed on the application of the Crown, on the ground—the crime being murder—that the case had twice been ready for hearing, once in the local venue and once in the venue fixed by the Winter Assizes Act, and on both these occasions the trial was postponed on the ground that an impartial trial could not be had ; it appearing on affidavit that large numbers of the jurors who would try the case, were members of an association called "The Land League," which had subscribed to the defence of the prisoners, the crime being of an agrarian character. This case was referred to by Mr. McCarthy, but the judgment of Mr. Justice Fitzgerald shews that no other order could possibly have been made in the case, and, in my judgment, it does not help the Crown on this application.

Then Mr. Nesbitt cited *Rex* v. *Harris* (1762), 3 Burr. 1330, a very old case, where it was held that the venue would not be changed except on very strong grounds. Lord Mansfield in his judgment says: "Now, in the present case, this general swearing to apprehension and belief only, is not a sufficient ground for entering such a suggestion." Also *The Queen* v. *Fay*, (1872), 6 Ir. R. (C. L.) 436 ; *Regina* v. *Casey* (1877), 13 Cox 614 ; *The People* v. *Congleton* (1872), 44 Cal. R. at p. 95 ; and Mr. Middleton, for Holden referred to *Brown* v. *The State* (1869), 18 Ohio St. R. 496.

I must, therefore, decline to make the order asked for.

Application refused.

[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. GRENIER (No. 2.)

Libel—Motion for Gratuitous Subpœnas—R.S.Q. 2614

1. The affidavit in support of a motion for the gratuitous issue of subpœnas for the defendant's witnesses should mention only two facts, viz., that the witnesses therein named are necessary for the defence, and that the accused is poor and needy.
2. If the defendant exceeds that requirement and gives in addition the particular facts which the required witnesses are expected to prove, the application should be refused, as the granting of it in that form might be a prejudging of the question of the admissibility of the evidence.
3. In the Province of Quebec, an accused can obtain the issue of subpœnas at the expense of the Government under R.S.Q. art. 2614, only in case of a crime which was a felony before the Criminal Code.
4. As libel was before the Criminal Code only a misdemeanor, the Court is not in such a case authorized, under R.S.Q. art. 2614 to order the gratuitous issue of the subpœnas desired by the accused.

MONTREAL, April 15, 1897.

WURTELE, J.—

Article 2614 of the Revised Statutes of the Province of Quebec permits the court, or the substitute of the Attorney-General, to order that the subpœnas for witnesses, necessary for the defence in a case of felony, be issued at the expense of the Crown when the defendant states by an affidavit that he is poor and needy.

In this cause the defendant asks that subpœnas be issued for certain witnesses whom he mentions in his motion, and he also mentions the reasons for which he considers such witnesses necessary for his defence. This defence consists a plea of justification, and the essential witnesses are necessarily those who can establish facts to prove that the libel charged was published for the public benefit.

He asks that the Hon. Mr. Laurier be summoned in order to establish that he had spoken of the Hon. Mr. Tarte as a

"radical fool," as a dangerous man, as one without principle, as an enemy of domestic relations and as a man whom the Canadian people should distrust; and that Sir Oliver Mowat be summoned in order to establish that when Minister of Justice he had declared in the Senate of Canada that the letter mentioned in the plea constituted a crime against the Constitution and the Criminal Code. The Judge has to decide what proof will justify a publication as being in the public interest, and he should so authorize the summoning of the witnesses, but it seems to me that the reasons given for having the Hon. Mr. Laurier and Sir Oliver Mowat summoned could not be proffered to establish the justification pleaded.

A motion asking the issue of subpœnas for the defence at the expense of the Crown should mention only two things:— first, that the witnesses required are necessary for the defence, and secondly, that the defendant is poor and needy.

On producing such an affidavit, unless its falsity is established, the defendant becomes entitled to obtain an order from the Court to have the subpœnas he desires without being obliged to pay the fees of the Clerk of the Crown.

In the present case the defendant goes further. He gives reasons, and if the Judge should grant the motion it would seem that he had approved of the reasons given and he would prejudge consequently the question of the admissibility of the evidence to be given by the witnesses in question.

The motion is then inadmissible in its present form.

But a peremptory reason for not granting the application presents itself.

I have just examined the article of the Revised Statutes concerning this matter, and have taken cognizance of the second paragraph which had escaped my attention when the question was first presented.

Article 2614 permits subpœnas to be obtained by a defendant without paying the fees of the officer who issues them in cases of felony, but declares in the second paragraph that in the case of a misdemeanor or of other offences lesser than felony the defendant is not entitled to this privilege.

It is true that the distinction between felonies and misdemeanors is abolished by the Criminal Code, but to properly interpret a statute of this province, of which the Executive is charged with the administration of justice, and consequently with regulating what concerns the payment to be exacted for subpœnas, it is necessary to see what offences were felonies, and what offences were not, at the time of the adoption of this law. At the time of the passing of the enactment, which is now contained in Art. 2614 of the Revised Statutes of Quebec, libel was only a misdemeanor. Consequently the Court has not the right to order, in this case, the issue of subpœnas gratuitously, and for this reason, I am obliged to reject the motion.

If the Crown, which is charged with the administration of justice, and with the payment of the expenses incurred for that purpose, should consider it proper to grant the subpœnas gratuituously it may do so; but the court cannot order it.

Motion rejected.

C. A. Cornellier, Q.C., for the defendant.

H. C. Saint-Pierre, Q.C., for the private prosecutor.

Note: A decision in the same case upon a question of irregularities in a plea of justification is reported Vol. 1. Can. C.C. page 55.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE, TOWNSHEND, MEAGHER AND HENRY, JJ.

THE QUEEN v. COX.

Grand Jury—Number for panel—Number to find true bill of indictment—Constitutional law—Matter of organisation of Court or of criminal procedure—Cr. Code 662 (2). B.N.A. Act 91 (27), 92 (14).

1. It is within the power of a Provincial Legislature to fix the number of the grand jurors, who should compose the panel, that being part of the organization or constitution of the Court.

2. A Provincial Legislature has no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion Parliament.

ARGUED: September 14, 1898.
DECIDED: November 15, 1898.

The following case was reserved for the opinion of the Court by Mr. Justice Townshend:

"The defendant was committed for trial at the sittings of the Supreme Court at Windsor, in the County of Hants, held in May, 1898. At that Court the prisoner was indicted, under an indictment, of which the following is a copy:—

"County of Hants.

In the Supreme Court.

The jurors of our Lady the Queen, present, that Frederick Cox, on the 12th day of May, in the year of our Lord, 1898, at Newport, in the said County of Hants, in and upon one George McKay, a peace officer, to wit, a constable, there and then engaged in the execution of his duty as such constable, unlawfully did make an assault.

The said jurors further present that the said Frederick Cox, on the said 12th day of May in the year aforesaid, at Newport aforesaid, did unlawfully resist, and wilfully obstruct the said George McKay, a peace officer, to wit a constable, then and there engaged in the execution of his duty as such constable.

The said jurors further present that the said Frederick Cox, on the said 12th day of May, in the year aforesaid at Newport, aforesaid, unlawfully did assault and beat the said George McKay. W. M. CHRISTIE,
Prosecuting Counsel.

Upon the trial of the prisoner he was found guilty upon the first count of the foregoing indictment.

Following the provisions of s. 1, of c. 101, of the N. S. Acts of 1898, the sheriff summoned twelve men only as grand jurors.

Upon the grand jury being called on the opening of said sittings, only ten appeared in answer to their names. These ten jurors were sworn in the regular form, and, after having considered the case against the prisoner, returned the above indictment, upon which he was tried and convicted.

Upon the arraignment of the prisoner, and before he pleaded to such indictment, counsel on his behalf took exception to the above indictment, and moved to quash the same. The learned judge presiding reserved the questions set out below, and the trial proceeded as in other cases. After the verdict was delivered, counsel for the prisoner again applied to the Court, and requested that certain questions mentioned below should be reserved for the opinion of the Court of Appeal. The learned judge presiding postponed sentence in the meantime, and reserved such questions for the opinion of the Court. The prisoner was then admitted to bail. The questions reserved for the opinion of the Court are as follows :—

1. Is it competent for the Local Legislature of Nova Scotia to pass an Act either fixing or altering the number of grand jurors which shall constitute a grand jury?

2. Is it competent for the Local Legislature to pass an Act fixing or altering the number of grand jurors who may find a bill?

3. Having regard to c. 106 of the Revised Statutes of Nova Scotia, and chaps. 38 and 101 of the Acts of 1898, was the grand jury for the county of Hants legally constituted at the said June sittings?"

By the constitution of Canada, B.N.A. Act. (Imp.), 1867, sec. 92, sub-sec. 14, exclusive jurisdiction is given to Provincial Legislatures to make laws in relation to "the administration of justice in the province, including the constitution, maintenance and *organisation* of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts"; and by sec. 91 of the same Act, sub-sec. 27, exclusive jurisdiction is given to the Parliament of Canada to legislate upon the subject of "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

By R.S.N.S. (1884), 5th series, ch. 106, sec. 29, provision is made for summoning grand jurors to the number of twenty-four for each sitting, and by sec. 34 of the same Act "no grand jury shall be composed of less than thirteen members."

By 57-58 Vict. (Can.), 1894, ch. 57, the following sub-section was added to sec. 662 of the Criminal Code of Canada, 1892:

2. Notwithstanding any law, usage or custom to the contrary, seven grand jurors, instead of twelve, as heretofore, may find a true bill in any *province* where the panel of grand jurors is not more than thirteen; provided, that this sub-section shall not come into force until a day to be named by the Governor by his proclamation.

A proclamation afterward issued, bringing the sub-section into force on the 1st day of January, 1895.

By N.S. Stat. (1898), ch. 38, passed 11th March, 1898, it was enacted as follows:

1. *Hereafter*, the number of grand jurors *to be summoned* at any term of the Supreme Court in any county shall be *twelve*, and no more, instead of twenty-four as at present, and the precepts to the sheriff for the return of grand jurors for the sittings of each term of the Supreme Court shall command the return of twelve such grand jurors.

2. *Seven* grand jurymen shall be competent to find a true bill in any matter, instead of twelve.

By N.S. Stat. (1898), ch. 101, also passed on March 11th, 1898, it was enacted that whereas the list of jurors for the county of Hants drawn at the last term of the Supreme Court at Windsor was destroyed by fire on the 17th day of October last, and no lists of jurors now exist, "the clerk of the County Court at Windsor shall at the next sitting or term of such County Court at Windsor, in April next, draw from the grand jury box in open Court the names of twelve grand jurors to serve on the grand jury at the next May term of the Supreme Court at Windsor, and shall thereupon issue writs of *venire facias* for the summoning of such jurors, and shall deliver the same to the sheriff at least ten days before the first day of the ensuing May term at Windsor, at which time such grand jurors shall be bound to attend."

C. S. Harrington, Q.C., for the prisoner: Chap. 101, N.S. Acts 1898, pre-supposes a grand jury in existence, and provides for the addition of twelve jurors. Chap. 38 does not apply until the October sittings of the Supreme Court and could not be invoked in the spring to supplement c. 101, which can be of no effect without it. The common law requirement that thirteen jurors must concur to find a bill is not repealed by c. 101. A local legislature cannot fix the number of grand jurors who can find a bill, this being a matter of procedure. *Regina* v. *Lawrence*, 43 U.C.Q.B. 164.

J. W. Longley, Attorney-General, contra: The Provincial Legislature, while it cannot abolish grand juries, can regulate the number. If the Dom. Acts, 1894, c. 57, is in operation, the difficulty as to c. 38, not being in force is avoided.

[MEAGHER, J.—But the number of jurors has not yet been reduced in the whole province, but only in the County of Hants.]

The word "hereafter," in c. 38, has become effective in Hants, but it could not operate in any other counties owing to existing conditions there, namely, that grand jurors for the ensuing year had already been drawn.

C. S. Harrington, Q.C., in reply.

HALIFAX, November 15, 1898.

RITCHIE, J.—

Frederick Cox was convicted at the last June term of the Supreme Court at Windsor, of an assault upon a constable.

Only twelve grand jurors were summoned to attend the court, and the indictment upon which the prisoner was tried was found by a jury composed of ten grand jurors only.

By the British North America Act, the right to legislate in respect of the criminal law, except the constitution of the Courts of criminal jurisdiction, but including the procedure in criminal matters, is exclusively vested in the Dominion legislature, while the Local Legislatures have the right to make laws regarding the constitution, maintenance and organization of the Provincial Courts of criminal jurisdiction. In many cases the procedure of a Court is so combined with its constitution and organization that it seems very difficult, if not impossible, to define clearly the line separating them. In this case I have adopted a view which commends itself to my judgment, and is, I think, generally in accordance with most of the legislation on this subject.

In 1892, the Legislature of Ontario reduced the panel of grand jurors to thirteen, but the act contained a proviso that it was not to go into effect until it was proclaimed by the Lieutenant-Governor.

It was afterwards enacted by c. 57, of the Dominion Acts for 1894, that seven grand jurors instead of twelve, might find a true bill in any province where the panel of grand jurors was not more than thirteen, but that such provision should not come in force until a day to be named by the Governor in his proclamation. When this Act was passed, in all the provinces of the Dominion, so far as I have been able to ascertain, the panels of grand jurors were of more than thirteen. The Act of the Dominion Legislature was soon afterwards brought into operation, and took effect on the 1st of January, 1895, and I think the local Act of Ontario reducing the panel was put in operation about the same time.

In my opinion it is within the power of the Local Legislature to fix the number of grand juror, who shall compose the panel, that being part of the organization or constitution of the Court; but that Legislature has no power to fix the number necessary to concur in finding a good bill of indictment, that being criminal procedure, and exclusively within the powers of the Dominion Legislature.

The Legislature of this province, by c. 38 of the Acts of 1898, have reduced the panel of grand jurors in this province to twelve, but that Act, on giving it what I consider its true construction, was not in force in June last in this province. This was conceded on the argument by the Attorney-General, but he contended that although it was not in force in the province generally, it was in Hants County, because the panel of grand jurors drawn at the previous October term had been destroyed by fire. I have been unable to appreciate the soundness of this argument, but, in the view I take, it makes no difference whether the Act was in force in the County of Hants or not.

I think the only Act which would authorize the finding of an indictment by ten grand jurors is the Dominion Act of 1894, and it applies only to provinces in which the panel is reduced; that is, when the panel is reduced in the whole province and not in one county only.

In my opinion, the first of the questions reserved should be answered in the affirmative, and the second and third in the negative.

TOWNSHEND, J.—

I concur in so far as my brother Ritchie decides that the Local Legislature cannot fix the number of grand jurors necessary to find an indictment, but I reserve any opinion on the question whether they can constitute the grand jury by naming a less number than twenty-four, that is, whether they can reduce the number which will compose the grand jury. It is open to a great deal of argument whether or not the grand jury is a part of the constitution of the Court. It is not necessary to decide that, and I refrain from expressing a decided opinion.

MEAGHER, J.—

I concur with my learned brother Ritchie in the answers to the three questions. With respect to whether the new grand jury Act was in force in Hants County, I do not wish to express a decided opinion, but I incline to the view that it was not.

HENRY, J.—

It would be sufficient for me to say that I concur in the result to the extent to which my brother Townshend has. Since, however, other members of the Court are inclined to concur to the full extent, I see no reason why I should not say that I do so also.

It seems clear to me that both the grand jury and the petit jury are constituent elements in our superior Criminal Courts, and that the constitution of such Courts being a matter assigned to the jurisdiction of the Local Legislature, the reducing of the number of persons to serve on such juries is a matter coming within the local jurisdiction; but it seems clear to me that the determination of the number necessary to find an indictment is a matter of procedure, and, therefore, not within the competency of the Local Legislature.

Conviction quashed.

Note: *Constitution of Grand Jury—Number to find true bill.*

The judgment in the above case is in consonance with the commonly accepted view as regards the respective jurisdictions of the Federal and the Provincial parliaments in defining the number of jurors requisite for the panel and for the finding of a true bill. The subject was reviewed by Mr. Justice Wurtele, of the Court of Queen's Bench, Montreal, in his charge to the Grand Jury at that city on November 2, 1898, since published in pamphlet form. The learned Judge after stating the qualifications required by the provincial statutes of Quebec for grand juries, said:

"Under the Common Law of England, which was extended to this country in criminal matters in 1774, the

Note—*Continued.*

panel of a grand jury consisted of twenty-four jurors, but one was struck off at the opening of the court, so that twelve jurors might form the majority of the grand jury; and then it was necessary that twelve at least should concur in finding a charge well founded. It was not necessary that all the twenty-three jurors should be sworn to form the grand jury or that they should all be present at its sittings, but it was necessary that twelve jurors, whatever number was sworn or was present, should join in every finding, and consequently that twelve at least should attend. The constitution of the grand jury and the qualification of the jurors are matters which appertain to the organization of a court of criminal jurisdiction, and which therefore fall under the jurisdiction of the Provincial legislatures, but on the other hand the regulation of the number of jurors who may be required to say if a charge is well founded, is a matter of criminal procedure and it comes within the legislative power of the Parliament of Canada. In order to lessen the expense of the administration of criminal justice, and to reduce the number of persons taken from time to time from their ordinary occupations to serve as grand jurors, it was thought expedient to diminish the number of jurors composing a grand jury and the number of its members who should have to concur in a finding. With this end in view the Parliament of Canada in 1894, by an amendment to the Criminal Code which is contained in the statute 57-58 Vict., ch. 57, enacted that "seven grand jurors, instead of twelve, might find a true bill in any province where the panel of grand jurors is not more than thirteen;" and the legislature of Quebec in 1895, by the statute 59 Vict., ch. 25, diminished the panel of grand jurors from twenty-four to twelve jurors. * * * The rule, however, as to the attendance of the grand jury, is analogous to the rule which existed when it was composed of twenty-three jurors. It is not necessary to constitute the grand jury, that all the twelve jurors summoned should be sworn, and it is not necessary either that twelve should be present at the sittings or when the grand jury come into

Note—*Continued.*

court, but it is necessary that seven at least should always be in attendance."

"The principal duty of the grand jury is to inquire into the accusations that are brought for indictable offences which are alleged to have been committed in the district, or over which it is alleged that the court has jurisdiction. Formerly the grand jury proceeded either upon bills of indictment, which are written statements of the charges against the accused prepared in precise and technical language by the crown prosecutors, or by the presentment of offences which might be within the knowledge of the grand jurors themselves; in the first case, the action of the grand jury was taken on the suggestion of the crown, and in the other it arose of its own motion from the knowledge of one or more of the jurors. Now, however, the faculty of proceeding by presentment has been taken away, and the grand jury can only proceed on the indictments which are laid before it, and indictments can only be preferred for charges on which a preliminary inquiry has been made before a magistrate, or, when there has been no preliminary inquiry, by the direction of the Attorney-General, or on the written consent of a judge, or by order of the court."

See also *R.* v. *Girard*, reported *post.* page 216.

[COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE OUIMET, J.

THE QUEEN v. GIRARD.

Grand jury—Panel not exceeding thirteen—Absence of juror summoned—Number required for indictment—57-58 (Can.) c. 57, s. 1—Cr. Code 662 (2).

1. In provinces where the grand jury has been reduced to thirteen jurors or less, the failure of some of the summoned jurors to attend will not invalidate a bill to which at least seven of the jurors in attendance agree.

MONTREAL, September, 1898.

OUIMET, J.—

In obedience to the law, art. 2652 of the R.S.Q., as amended by 59 Vic. Q., ch. 25, s. 4, the sheriff summoned twelve qualified persons to act as grand jurors during the present term. One of them did not appear, and only eleven were sworu to act as a grand jury. As such they have reported a true bill on the indictment as laid against the defendant. His counsel moves now to have this indictment quashed on the ground that no true bill can be found and reported by a grand jury unless there be at least twelve grand jurors present.

The only authority cited on behalf of the defendant is that maxim of the criminal law of England that no man can be convicted of an indictable offence except, as Blackstone says, by the unanimous voice of twenty-four of his equals and neighbors, that is, by twelve at least of the grand jury, in the first place assenting to the accusation; and afterwards by the whole petit jury of twelve more finding him guilty.

This was our law until it was amended by 57-58 Vict. (Can.), ch. 57, s. 1, [Cr. Code 662 (2)] enacting that: "Notwithstanding any law, usage or custom to the contrary, seven grand jurors, instead of twelve as heretofore, may find

a true bill in any province where the panel of grand jurors is not more than thirteen."

By the 6 Geo. IV., c 50, s. 13, the number of grand jurors to be summoned was fixed at twenty-four, and of those *as many as appeared upon the panel returned* but not more than 23 (so that twelve may be a majority) were sworn upon the grand jury. (Stephens, Com., vol. IV, p. 370, Ed. 1888; Woolrich, A. L. 42; Chase's Blackstone, 1005; Ewell's Blackstone, 566; Brown's Blackstone, 685; Kennedy's Law and Practice of juries, 116; 1 Chitty's Cr. L. 306; Cornish's Juryman's Legal handbook, 49, 51).

The unanimous consent of twelve jurors was necessary to enable the grand jury to report a true bill, and therefore out of the 24 summoned it was necessary that there should be at least twelve present; but the absence of the twelve others did not prevent the twelve jurors present from proceeding with their inquiry and, if unanimous, bringing in true bills.

Now this number of twelve has by our law been reduced to seven. I am of opinion that if some of the twelve grand jurors summoned do not appear, those present can be sworn and act as a grand jury provided their number is not less than seven—the number required by our present law to agree on a true bill.

I find nowhere that the accused has the right claimed by the present defendant to have his case inquired into by not less than twelve grand jurors before he can be put on his trial.

The motion is dismissed.

Indictment sustained.

Cooke, Q.C., for the Crown.

Saint-Pierre, Q.C., for the prisoner.

Note: See *R.* v. *Cox*, reported in page 207 *ante*, and note to same.

[COURT OF GENERAL SESSIONS, COUNTY OF YORK, ONTARIO.]

TRIAL BEFORE McDOUGALL, J., AND A JURY.

THE QUEEN v. LYONS.

Police magistrate—Justice of the peace acting in place of—Description of capacity in warrants, etc.—Wrong designation—Liquor License Act (Ont.)—Warrant to search premises—Illegal keeping for sale.

1. A justice of the peace acting in the illness or absence or at the request of a police magistrate should be designated as so acting, in warrants or other process, otherwise the latter will be invalid.
2. A warrant signed by a justice of the peace so acting, in which he is described as "police magistrate," is void.
3. The initials "J.P." following the signature of the person presuming to issue a warrant is not a sufficient description of such person as a justice of the peace for the city or county in which the warrant purports to have been issued.

ARGUED: September 22, 1892.
DECIDED: September 23, 1892.

The prisoner was charged with obstructing a police officer in the discharge of his duty, and with feloniously wounding him. The officer, accompanied by other policemen, had forcibly entered the prisoner's house for the purpose of executing a warrant to search the premises for intoxicating liquor alleged to be illegally kept there for sale. The prisoner resisted the search, and drew a loaded revolver upon the officers, but the cartridge failed to explode. The warrant was signed by Hugh Miller, Esquire, described therein as "J.P.," and as "police magistrate in and for the city of Toronto," but the latter designation was clearly made in error, as it was not pretended that Mr. Miller had ever been appointed to that office or had done more than to occasionally act as a justice of the peace sitting for the police magistrate at the latter's request or in his absence.

At the close of the evidence for the prosecution, counsel for the prisoner moved for the prisoner's acquittal on the

ground that the warrant was invalid because of such improper description of Mr. Miller, and because it did not contain any mention other than the letters "J.P.," following the signature, that he is a justice of the peace, nor disclose that in issuing the same he was acting in the illness or absence of the police magistrate, or at the latter's request.

DuVernet, for the prisoner.
H. H. Dewart, for the Crown, contra.

TORONTO, September 23, 1892.

McDOUGALL, Co. J.—

I have examined the points raised by Mr. DuVernet as to the invalidity of the warrant, and have come to the conclusion that the warrant is invalid, as Mr. Miller, who issued the warrant, is nowhere described to be a justice of the peace in and for the city of Toronto, nor does the warrant disclose that he was acting in the illness, absence, or at the request of the police magistrate. The only reference in the warrant is the initials "J.P.," which initials do not describe him with sufficient fulness. Mr. Miller is also improperly described, after his signature, as police magistrate in and for the city of Toronto, which is incorrect. The warrant being void, I suppose if Lyons had killed the constable the offence would have been manslaughter, and not murder, under my view on the point raised. Dealing with a police officer who is acting without authority reduces the quality of the crime from murder to manslaughter, if the officer is not within his authority. Fortunately no evil resulted in this case. Our law is careful to protect the liberty and rights of the subject, and it says that if a peace officer or any other person invades a house or home without authority he is a trespasser, and that the occupant is justified in using such degree of force as is necessary to either eject him or prevent him from carrying out what he may claim to be a privilege, but which he has not the proper authority to exercise. Unfortunately, the magistrate who signs this warrant does not sign any statement showing that he has authority to act. Our Act

says that no one can act but the police magistrate, except in the absence or illness, or at the request, of the police magistrate; and any magistrate who purports to act in the city of Toronto concerning an offence in the city of Toronto must aver on the face of his summons, or warrant, or conviction, as the case may be, that he comes within the exception; he must state that he is acting in the absence of the police magistrate, or acting on account of the police magistrate's illness, or acting at the express request of the police magistrate; then on the face of the document his authority is apparent.

Another defect which I think is also fatal is that Mr. Miller describes himself, in signing the warrant, as police magistrate in and for the city of Toronto, an office which he does not hold and which it is not contended that he holds. The authority, then, under which this search was made, being destroyed, these officers had no right to be there; and the owner of the house was justified in forbidding them to make a search, and in refusing to allow them to do so. I think it is unfortunate that the technical objection is well founded in this case, because it would have been well to give people to understand that they have no right to use a deadly weapon; and there is evidence here that the weapon was not only presented, but it was attempted to be fired, if the evidence of the constables be believed. The case cannot properly be sent to the jury and the prisoner will be discharged.

Prisoner discharged.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

NORTHERN ALBERTA JUDICIAL DISTRICT.

BEFORE SCOTT, J.

THE QUEEN v. MacDONALD.

Evidence— Confession —Admissibility—Threat or inducement preceding confession—Stealing post-letter— Cr. Code 326 (6).

1. A confession by an accused person charged with stealing post-letters, induced by a false statement made to him by a detective employed by the prosecution, in presence of a post office Inspector, that the accused had been seen taking the letters, will render the confession inadmissible in evidence against the accused.

DECIDED: November 10, 1896.

The defendant was charged under sec. 326 (6) of the Criminal Code, with stealing a post letter from a post office box.

That section provides that "Everyone is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than three years, who steals—

(*b*) a post letter from a post letter bag, or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail."

The facts of the case were as follows:—The defendant, MacDonald, was a practising physician, and he and Dr. Lafferty had been practising as physicians and surgeons in partnership at Calgary. The firm had a lock letter box in the Calgary post office. The partnership was dissolved, Lafferty keeping the old P.O. box, but MacDonald still retaining his key to it, taking, however, a separate P.O. box of his own. Mail matter for Dr. Lafferty being missed out of his box, detective Brooks, of Calgary, was instructed by the post office authorities to make an investigation. Brooks then prepared two decoy letters, addressed one to Dr. Lafferty

and the other to the latter's son ; took them himself in behind the wickets, caused them to be stamped by the postmaster there, and taking them from the postmaster, walked to Dr. Lafferty's box and dropped them in from the inside.

The next day, during Brooks' temporary absence, the letters addressed to "Dr. Lafferty" disappeared.

During the afternoon of the day during which the letter had disappeared, Brooks and Assistant Post Office Inspector Phinney went to Dr. MacDonald's house. MacDonald knew Brooks, and was aware that he was a detective, and Brooks introduced Phinney as Assistant P.O. Inspector.

Phinney was put in the box upon the trial, and, as he was proceeding to repeat MacDonald's alleged confession, counsel for the accused objected to the evidence, and with the permission of the judge, proceeded to cross-examine Phinney as to any inducement, or threat, preceding the alleged confession.

The conversation which took place at MacDonald's house at the time of the alleged confession was conducted by Phinney and MacDonald in Brook's presence, and was substantially as follows :

Phinney : We have come down to see you, doctor, about those letters that have been disappearing from Dr. Lafferty's box.

MacDonald : I don't know anything about Dr. Lafferty's box or his letters.

Phinney : Oh ! yes, you do. Where is the key of the box, which you kept ?

MacDonald : I lost it. I have not had that key for months.

Phinney : There is no use you denying it, doctor. We have very strong evidence against you ; quite strong enough to convict you.

MacDonald : I know nothing whatever about any of Dr. Lafferty's letters.

Phinney : Now, doctor, there is no use of your denying it. You were seen taking the letters out of the box. You might as well own up as to have it brought out in a court of justice.

At this stage of the conversation Brooks produced the letter to Lafferty's son, which was a counterpart of the one

addressed to Lafferty himself, and which had not been taken away from the box until Brooks himself took it out, and, holding it up before MacDonald, said: "Did you ever see this before?"

MacDonald had then made the alleged confession.

Phinney admitted, on his cross-examination, that his statement to MacDonald that he (MacDonald) had been seen taking letters out of the box was untrue.

A. L. Sifton, for the Crown.

J. R. Costigan, Q.C., and *P. J. Nolan*, for the prisoner.

CALGARY, N.W.T., November 10, 1896.

SCOTT, J.—

Whatever justification there might be for a person in authority endeavoring to worm a confession out of a suspected person, there was certainly no justification for such a resort to falsehood. The statement: "You might as well own up as to have it brought out in a court of justice" made to the accused was equivalent to "If you do not tell us, it will be brought out in a court of justice." Such a threat made by a person in authority renders the confession inadmissible.

There being no other evidence offered in support of the indictment, the prisoner is discharged.

Order for prisoner's discharge.

Note: *Confession—Admissibility—Interrogation of prisoner by person in authority.*

See note to *The Queen* v. *Hammond*, 1 Can. C.C. at pages 398-401; and *The Queen* v. *Jackson* (1898), p. 149 *ante*, and note to same.

Stealing a Post letter—Canada Post Office Act—Decoy letter irregularly posted.

By sec. 4 of the Criminal Code and by 52 Vict. (Can.) c. 20, s. 2 amending "The Post Office Act" R.S.C., 1886, c. 35, s. 2 sub-sections *(i)*, *(k)*, and *(l)*, the expression "post letter" is declared to mean "any letter transmitted by the post or delivered through the post, or deposited in any post

Note—*Continued.*

office or in any letter box put up anywhere under the authority of the Postmaster-General;" and a letter shall be deemed a post letter from the time of its being so deposited or delivered, to the time of its being delivered to the person to whom it is addressed; and a delivery to any person authorized to receive letters for the post shall be deemed a delivery at the post office, and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed. 52 Vict. (Can.), 1889, c. 20, s. 2.

A decoy letter placed by post office officials into the post office for the purpose of being put into the possession of a letter-sorter who was suspected of dishonesty, and which letter was surreptitiously put into his heap of letters to be sorted, was held not to be a "post letter" under the English Post Office Act. *R.* v. *Rathbone* (1841), Carrington & Marshman's Reports 223, 2 Moo. C.C. 242.

And a decoy letter prepared by post office officials and handed in at the post office window where letters are usually posted, but received there by an inspector not authorized to receive letters, and by him passed to another inspector and kept under his care until it was placed by his direction with other letters which the suspected employé was about to sort, was held not to be a "post letter," as it was not received in the ordinary course of the post office, and was not delivered to a person authorized to receive letters for the post. *R.* v. *Shepherd* (1856), 25 L.J.M.C. 52, 2 Jurist (N.S.) 96; per Pollock, C. B., Alderson, B., Cresswell, Williams and Willes, JJ.

It may therefore be doubted whether a conviction could have been sustained in the principal case had the taking of the decoy letter been proved by proper evidence, because of the irregular manner in which the letter was delivered at the post office, and there dealt with before the alleged taking.

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WURTELE, J.

THE QUEEN v. RIOPEL.

Rape—Female under fourteen years—"Woman"—Interpretation of Statute—Cr. Code, 266, 267, 269.

1. The words "man" and "woman" in the Criminal Code, sec. 266, which defines the crime of rape, are to be taken in a general or generic sense as indicating all males and females of the human race, and not in a restricted sense as distinguished from boys and girls.

2. An indictment for rape under the Criminal Code, secs. 266 and 267, lies against one who has ravished a female under the age of fourteen years against her will, notwitstanding the provisions of sec. 269, which enacts that everyone is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife.

MONTREAL, November 22, 1898.

WURTELE, J.—

The prisoner, Zénophile Riopel, is now standing his trial on an indictment charging him with having forcibly and without her consent ravished and carnally known one Marie Rose Lamoureux.

The indictment is laid under articles 266 and 267 of the Criminal Code, which enact that rape is the act of a man having carnal knowledge of a woman, who is not his wife, without her consent, and that he who commits that crime is liable to the penalty of death or to imprisonment for life.

The first witness, Zoé Archambault, the mother of the person on whom the crime is alleged to have been committed, has just been heard, and she has proved that her daughter is only nine years old.

The counsel for the prisoner has now moved that the indictment be quashed, because, in the first place, rape, which may be punished by death, must under article 266 be committed on a woman, whereas the person who is alleged to have been ravished is a girl, and the article in question

consequently does not apply to the offence committed on her; and because, in the second place, if the girl has been carnally known by the prisoner, the crime committed by him comes under article 269 of the Criminal Code, which makes it an indictable offence, punishable only by imprisonment and whipping, for any one to carnally know any girl under the age of fourteen years, not being his wife, and this enactment supersedes the enactment respecting rape in the case of females under the age of fourteen years.

I will take up the two objections in the order in which they were made.

The first is that the article of the Criminal Code on which the indictment is laid does not apply to the case now before the Court, that rape by this article is the act of a man having carnal knowledge of a woman, and that in this case the person on whom the crime is alleged to have been committed is shewn to have been a girl and not a woman. We have therefore to consider in what sense the words "man" and "woman" are used in the article defining the crime of rape, whether they are used in a general and generic sense, so as to apply to all individuals of the human race, or in a restricted sense as opposed to boys and girls, and consequently so as to apply only to adults and to exclude boys and girls. A male person is a boy after he has attained the age of fourteen years, and yet paragraph 2 only excludes males under the age of fourteen years from the effect of the article, leaving it applicable to boys above that age; and, then, the constant jurisprudence of the Criminal Courts has been that the crime of rape may be committed upon a female whatever may be her age. In support of this assertion, I may quote the following authorities:—

Roscoe's Criminal Evidence, page 853: "It has never been doubted that having connection with a child under ten years is a rape, whether she consents or not."

American and English Encyclopædia of Law, Verbe Rape, page 948: "The crime may be committed upon any female, of whatever character, mental capacity, or age, if without her consent."

The reason of the exception of males under the age of fourteen years is because a boy under that age is presumed by law to be unable to commit a rape. To shew the construction to be given to the words "man" and "woman," I can cite the following authorities:—Bishop on Statutory Crimes, No. 211: "A girl under twelve years of age, not attained to puberty, is a *woman* within the former statute of Virginia making it felony punishable by death, for a slave, free negro, or mulatto, to attempt to ravish a white woman." Beal's Legal Interpretation, page 32: "You are to give the words their larger meaning, unless you find something which plainly shews that they were intended to be read in a more restricted sense." And page 146: "General words in a statute must receive a general construction, unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction and not by arbitrary addition or retrenchment."

There is nothing in the Criminal Code which limits or restricts the meaning of these words by reasonable construction, and the sense in which the words "man" and "woman" are employed in the article defining the crime of rape is therefore their generic or widest sense, as being the male or the female of the human race, and they comprehend both adults and children, with the exception contained in the proviso of boys under the age of fourteen years.

The fact that the female upon whom the crime is alleged to have been committed is only of the age of nine years does not prevent a charge of rape being laid against the prisoner, and it cannot therefore be urged that the indictment for rape should be quashed, simply because it has been proved that she is a girl and not an adult woman.

I now come to the second objection, which is that the indictment should have been laid, inasmuch as the girl whom it is alleged that the prisoner carnally knew is proved to have been under the age of fourteen years, not for the crime of rape, but for the offence of defiling a child, under article 269 of the Criminal Code, which is a lesser offence and

subjects the offender only to imprisonment and whipping and not to the penalty of death.

Every one is guilty of an indictable offence who either commits rape or carnally knows any girl under the age of fourteen years, but the two offences are, however, essentially different; the first is the act of a man who carnally knows a woman forcibly and without her consent, while the other is the act of a man, who without force, but by artifice, by persuasion or by other means, unlawfully has carnal knowledge of a girl under the age of fourteen years, with her compliance or consent.

The contention of the prisoner is that as the female whom he is alleged to have carnally known is a girl under the age of fourteen years, he can only be charged with the offence mentioned and defined in article 269, and that an indictment for rape does not lie for ravishing or defiling a girl under that age. The difference between the offences is as has been already stated, that in the one, that of rape, the woman must have been forcibly ravished without her consent, while in the other the defilement takes place without force being employed, and with the compliance or consent of the girl. When force is used and the girl does not consent, there are circumstances connected with the act which has been committed beyond those which constitute the offence of defilement, and which remove it from the perview of article 269, but which bring it under the scope of articles 266 and 267, as these circumstances connected with the fact of carnal knowledge complete the essentials which constitute the crime of rape. When there has been no violence, and the girl has consented or complied, the offence falls under article 269; but when there has been violence, and when the girl has not consented, then, notwithstanding the fact that the girl is under fourteen years of age, the crime is rape, and falls under articles 266 and 267. It surely cannot be supposed that Parliament intended to abolish the crime of rape as to girls over whom extra statutory protection is cast.

In making this statement I am supported by judicial decisions and by the text books.

Here are some of the decisions: In England it was enacted by the Statute 38 and 39 Vict., ch. 94, that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen, whether with or without her consent, shall be guilty of a misdemeanor." The question was raised in consequence of this enactment, whether an indictment could lie for rape where the girl ravished was between the ages of twelve and thirteen years, or whether the offender could only be tried for a misdemeanor under the statute; but it was decided in the Oxford Circuit, by Mr. Justice Mellor, in the case of *Regina* v. *Dicken*, 14 Cox, C.C. 8, that when the girl did not consent, the higher crime of rape still existed, and that the offender might be indicted and tried for it notwitstanding the statute for the special protection of children. The decision was after confirmed by the Court for crown cases reserved in the case of *Regina* v. *Ratcliffe*, 15 Cox C. C. 127, in which judgment was delivered by Chief Justice Coleridge.

In Montreal, in the September term of the Court of Queen's Bench of the year 1878, the late Mr. Justice Ramsay, in the case of *Regina* v. *Damien Bonin* (which has not been reported) maintained an indictment for rape where it was proved that the girl on whom the crime was committed was only four years old.

I will now give some extracts from the text books.

Taschereau on the Criminal Code, page 275: "An indictment for rape still lies for ravishing a girl under fourteen."

Shirley on the Criminal Law, page 57: "The consent of the girl is no defence, though if she did not consent the prisoner might be indicted for rape."

I am of opinion the prisoner's contention is unfounded, and that an indictment for rape lies against one who ravishes a female under the age of fourteen years forcibly and without her consent, notwithstanding the provisions of article 269 of the Criminal Code, which, creating a crime lesser than rape, enacts that every one is guilty of an indictable offence who carnally knows any girl under the age of fourteen years, and which subjects such offender to imprisonment for life and to

be whipped, and not to capital punishment as in the case of the higher crime.

The motion asking that the indictment in the present case be quashed is rejected; but as the indictment is for rape and not for the defilement of a girl who is under fourteen years where consent is immaterial, if it should be established by the evidence which will be given that the girl consented to the carnal knowledge, the crime charged against the prisoner will not be made out.

Motion rejected, and indictment maintained.

F. O. Dugas, for the Crown.

G. A. Cornellier, Q.C., for the prisoner.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, HANINGTON, BARKER AND VANWART, JJ.

EX PARTE RAYWORTH.

Summary Conviction — Costs — Excessive Constable's Fees— Cr. Code 871.

1. The allowance by the magistrate on a summary conviction, of excessive costs in respect of mileage to the constable for serving subpœnas upon witnesses, is not a ground for quashing the conviction.

ARGUED: April 15, 1896.

DECIDED: June 10, 1896.

In this case an order nisi for certiorari was granted by Mr. Justice Landry, in vacation, to remove a conviction made by Walter Cahill, Stipendiary Magistrate for the County of Westmorland, against the applicant, for keeping liquor for sale contrary to the provisions of the second part of the Canada Temperance Act, with a view of quashing the same, on the following ground: That the magistrate exceeded his

jurisdiction in awarding costs in excess of the table of fees prescribed by the Act.

D. Grant, for applicant.

McCully, contra.

The following authorities were cited, *Ex parte Howard*, 32 N. B. R. 237; *Regina* v. *Brown*, 16 Ont. R. 41; *Ex parte Mowrey*, 3 All. 276; *Regina* v. *Rose*, 22 N. B. R. 309; *Byrne* v. *Arnold*, 24 N. B. R. 161.

FREDERICTON, N.B., June 10, 1896,

The following judgment was delivered by

TUCK, C.J.—

This is an application for a certiorari to bring up a conviction made by Walter Cahill, Stipendiary Magistrate for the County of Westmorland, against Bill C. Rayworth for keeping intoxicating liquor for sale, in violation of the second part of the Canada Temperance Act.

An order nisi was granted by Mr. Justice Landry, returnable at Easter Term.

The only ground put forward for the order was that the magistrate exceeded his jurisdiction by directing the defendant to pay costs in excess of those allowed by the tariff of fees under s. 871 of the Criminal Code. The costs were taxed at thirty-three dollars and five cents. The alleged excess is chiefly for witness fees, and the complaint is made that mileage is taxed for the constable serving subpœnas on a number of witnesses, all of whom resided on the same route of travel within a few miles of each other, and who could have been served by any person on one trip or journey from Sackville, without in so doing travelling more than thirty miles each way. Costs are taxed for travel in serving each witness. It may be that in strictness of law the costs were properly taxed, but it does seem unreasonable that if on the one day and on the same route of travel a constable served six or seven witnesses with summons, he should receive separate mileage for each witness.

But I am prepared to decide this on the grounds that even if the costs are taxed in excess of what is authorized by the Code, the jurisdiction of the magistrate is not thereby affected.

There are conflicting decisions of this Court on that point. In *Ex parte Bourque*, 31 N. B. R. 509, it is decided, as stated in the head note, that it is an excess of jurisdiction in a conviction under the Canada Temperance Act to award costs other than those provided by 52 Vict., c. 45, s. 2. Judge Palmer is reported to have delivered a short Judgment in that case, in which Sir John C. Allen, C.J., King and Tuck, JJ. are said to have concurred. I have no recollection of that decision.

In *Ex parte Howard*, 32 N. B. R. 237, decided more than two years after *Ex parte Bourque*, the same point came up. and I delivered the judgment of the majority—Fraser, Tuck and Hanington, JJ., (Palmer and King, JJ. dissenting). In *Ex parte Howard* the judgment is, that charging excessive costs is not a ground for quashing a conviction. I adhere to that opinion for the reasons given in the judgment.

I think the order must be discharged.

HANINGTON, BARKER AND VANWART, JJ. concurred.

Order nisi discharged.

Note: *Summary Conviction—Excessive Costs—Cr. Code 871.*

The erroneous allowance of certain items of costs by the magistrate having general jurisdiction over the costs will not warrant the quashing of the conviction for want of jurisdiction where the right to a certiorari upon other grounds is taken away by statute. *R.* v. *Brown* (1888), 16 Ont. R. 41, 47.

Where certiorari is said to be taken away by statute, a Superior Court is not absolutely deprived of the power to issue the writ, but its action as to the writ is controlled and limited, and it cannot quash the order removed by certiorari except upon the ground of—(1) a manifest defect of jurisdiction in the tribunal that made the order, or (2) a manifest fraud in the party procuring it. *Colonian Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; *Ex parte Howard* (1893), 32 N.B.R. 237.

Note—*Continued.*

Objections on the ground of defect of jurisdiction may be founded on—(1) the character and constitution of the inferior Court, (2) the nature of the subject-matter of the inquiry, or (3) the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court. *Ibid.*

The making up of the costs is a ministerial act, and does not go to the jurisdiction. If the magistrate, in making up the costs, has not acted *bona fide*, he is liable to a criminal information, or if, with no dishonest intention, he has taken too much for costs he may be made to disgorge, but his conviction is good. *Ex parte Howard* (1893), 32 N.B.R. 237, per Tuck, Fraser and Hanington, JJ.

[COURT OF GENERAL SESSIONS FOR THE COUNTY OF YORK, ONTARIO.]

TRIAL BEFORE McDOUGALL, COUNTY JUDGE, WITH A JURY.

THE QUEEN v. LEE.

Jurisdiction of magistrate—Preliminary inquiry—Reducing charge from 'wounding' to 'assault'—Conviction on plea of guilty of assault—Indictment—Plea of autrefois convict—Cr. Code, 242, 594, 595, 596, 631.

1. Justices of the Peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction.
2. A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict.

ARGUED: December 29, 1897.

DECIDED: December 29, 1897.

Indictment of the defendant for unlawfully wounding one Miller.

The following statement of facts was agreed upon: An information was laid on the 4th of June, 1897, by J. T. Jones, High Constable for the County of York, before H. R. Frankland, a Justice of the Peace for the County of York, charging in the usual form, that Charles Lee, on the 18th of May, 1897, at the Township of York in the said County, did unlawfully shoot at and wound, with intent to do grievous bodily harm to, one Charles Miller. A warrant was issued and Charles Lee was brought up before two magistrates, H. R. Frankland and Mr. J. D. Evans, both Justices of the Peace for the County, on the 11th June, 1897. The only witness called was the witness Charles Miller, upon whom it is alleged in the information that the assault had been committed. That closed the evidence for the Crown, and no evidence was called for the defence. The offence being of an indictable character it was urged on behalf of the Crown that the prisoner Lee should be committed for trial, it being contended that this was an offence which the magistrates had no power to try and dispose of. Without the information being amended and without the consent of the Crown to any amendment in the charge as laid, the magistrates reduced, or undertook to reduce the charge to common assault; and this memo. appears upon the face of the information:

"Reduced to common assault. Fined $10 and costs or 30 days in jail at hard labor.

Pleads not guilty, and paid.

(Sgd) H. R. FRANKLAND, J.P.
J. D. EVANS, J.P."

The sum of $17.04 was paid to the magistrates to cover the fine and costs, which sum has been held by the proper authority pending the disposition of this further indictment. At the request of the officer representing the Crown, the informant, J. T. Jones, in view of the objection that had been raised to the course that the magistrates had pursued, was bound over to prosecute under section 595 of the Code; and the present indictment was preferred before the Grand Jury, at the General Sessions of the Peace, in September, 1897,

with the consent of the Judge presiding at such sessions. The original information and evidence taken before the magistrates, together with their memorandum in reference to the proceedings before them, were by consent put in as part of the case for the prosecution.

On the defendant's behalf a special plea of autrefois convict was filed, and also a formal conviction signed by the magistrates.

R. J. Gibson, for the defendant, argued that there was a valid and formal conviction for common assault, and that same being a judicial act on the part of the Justices of the Peace, the only proper way to have proceeded to attack its validity would have been to have moved to quash the conviction. The conviction now existing, it is impossible to go behind it, and the plea of autrefois acquit must be sustained.

[McDOUGALL, Co. J.—Suppose the charge had been manslaughter?]

Gibson: That would have been different. Assault is the offence. The facts that make aggravated assault are not different facts. The magistrates were seised of jurisdiction by the laying of an information. *R.* v. *Miles*, 17 Cox. C. C. 9; *R.* v. *Elrington*, 1 B. & S. 688; Cr. Code, section 631.

H. H. Dewart, for the Crown, contra.

TORONTO, December 29, 1897.

McDOUGALL, Co. J. (Chairman)—

This is an indictment against the defendant, charging him with unlawfully wounding a man named Miller. What appears to have taken place is that in June last the High Constable of this county laid an information against the defendant charging him with wounding with intent to do grievous bodily harm. This is an offence which under the Code is known as an indictable offence—an offence which the magistrates themselves cannot dispose of. All they can do is to investigate and decide as to whether there is sufficient evidence to justify them either in dismissing the complaint

or committing the defendant for trial. What the magistrates did do, as appears by the record, is that after having heard the evidence of the man who is said to have been injured, who detailed particular facts, and without dismissing the complaint—if they were satisfied that that offence was not made out as laid in the information—or without committing for trial, they took upon themselves to adjudicate by saying that they would reduce the offence to the charge of common assault—a thing which, under the Code, as I understand it, they had no power whatever to do. Instead of dealing with that information in the manner applicable to charges of indictable offences, they dealt with the whole case as if the information had been simply for common assault, triable by themselves summarily.

They fined the defendant $10 and costs, and thereafter promulgated a formal conviction. The informant, who was the High Constable in that instance, objected to that proceeding at the time, contending that the magistrates had no power or authority to pursue the method they adopted, and requested to be bound over to prosecute for the offence at the ensuing Sessions. Now, if the magistrates had acted within their powers and had dismissed the complaint, the High Constable could have taken the same course and asked to be bound over to prosecute, and then if the grand jury found that the facts made out an offence similar to that charged in the indictment, they could then have properly found the bill just now before us. As the magistrates usurped—as I find—their functions, and did something which they had no power to do, the bill in question was properly preferred before the grand jury, and the defendant is properly before this Court to be tried. When he is arraigned upon this indictment, his counsel puts in a plea of autrefois convict. I hold as a matter of law that this former conviction, such as it is, or whatever it is, is no bar to the present proceeding as a matter of law. If there were any dispute as to what had transpired before that Court, or as to any steps taken, they would be proper matters for the jury to pass on after hearing witnesses; but there is no dispute—all parties agree exactly

as to what took place. The question is, did the magistrates act within their jurisdiction in doing what they did? Were they a competent Court to make the ruling or adjudication that was made in this case?

I am of the opinion that the conviction pleaded in this case is null and void; that it is not a conviction of a Court of competent jurisdiction; the information was for an indictable offence, and the only power possessed by magistrates was to dismiss or commit for trial; they had no power to reduce the offence, and thereupon proceed to adjudicate; no provision in our Code confers any such power or sanctions any such method of procedure. As the facts are all admitted, I direct the jury to find for the Crown upon the issue joined upon the plea of autrefois convict.

Verdict accordingly.

Note: *Assault—Summary proceedings before justices—Subsequent indictment for same cause—Autrefois convict.*

The decision reported above is based upon the want of jurisdiction of a justice of the peace to transfer or change a preliminary investigation upon a charge of an indictable offence into a summary trial for an offence based upon the same facts, but of a less serious nature, over which he would have jurisdiction had the information been laid for such lesser offence with a request for a summary hearing. Without an information or complaint in respect of an offence within his summary jurisdiction, the magistrate is not constituted a court of summary jurisdiction. In the principal case the complainant had objected to the charge being "reduced," and the justices had therefore no summary jurisdiction in the matter, and were bound to either discharge the accused, if upon the whole of the evidence they were of opinion that no no sufficient case was made out to put the accused upon his trial (Cr. Code 594), or commit him for trial by a warrant of commitment (Code form V., sched. 1) if they thought that the evidence was sufficient "to put the accused on his trial." (Cr. Code, 596).

Note—*Continued.*

If, however, the charge laid is for assault or battery, the justice may summarily hear and determine the charge unless at the time of *entering upon* the investigation "the person aggrieved or the person accused objects thereto" (Cr. Code, 864); but whether or not objection is made, if the justice comes to the conclusion that the assault or battery complained of is 'a fit subject for prosecution by indictment' (Cr. Code, 864 (2)), it then becomes his duty to abstain from any *adjudication* thereupon, and to deal with the case in all respects in the same manner as if he had no authority, 'finally to hear and determine the same.' Cr. Code, 864 (2).

If the complaint *for assault or battery* is so preferred, by or on behalf of the person aggrieved, and the accused is convicted, and pays the whole amount adjudged to be paid, or suffers the imprisonment or 'imprisonment with hard labor' awarded, he is released from all further or other proceedings, civil or criminal, for the same *cause*. (Cr. Code, 866).

Conviction or dismissal by justices of assault charge, as affecting subsequent indictment for wounding or manslaughter.

A summary conviction for assault has been held sufficient to bar a subsequent indictment, charging an assault and wounding with intent to murder, where the accused had been summoned before magistrates by the prosecutor of the indictment for the same assault, and had been imprisoned on his making default of payment of the fine imposed by the magistrates. *R.* v. *Stanton* (1851), 5 Cox C.C. 324. (per Erle, J.)

It was said by Coltman, J., in *R.* v. *Walker* (1843), 2 Moody & Rob. 446, that there is no difference in principle whether a party has been convicted or acquitted; and that on a complaint for a common assault the justices were to determine whether such assault was accompanied with any *felonious intention*, and on that question they are like any other court of competent jurisdiction, and their decision is of the same finality as if the party had been convicted by a jury. 2 Moody & Rob. 457.

Note—*Continued.*

The rule at common law is that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence; the principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. *R.* v. *Miles* (1890), 17 Cox C.C. 9.

It is a well-established principle that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. *R.* v. *Elrington* (1861), 1 Best & Smith 688, 696, (Cockburn, C.J., and Blackburn, J.)

It was held by the Court for Crown Cases Reserved in *R.* v. *Morris* (1867), L.R. 1 C.C.R. 90, that a conviction for assault and the imprisonment consequent thereon are not either at common law or under 24-25 Vict., c. 100, s. 45 (Can. Cr. Code 866), a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault; (per Martin, B., and Byles and Shee, JJ.; Kelly, C.B., dissenting).

In the last mentioned case, Martin, B., considered the word "cause" in the statute corresponding to sec. 866 of the Code, as used synonymously with the words "accusation" or "charge"; while Byles, J., said that the word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also and, perhaps, with greater propriety be held to mean "cause for the accusation"; and in that view the cause for the indictment for manslaughter comprehended more than the cause in the summons before the magistrates, "for it comprehends the death of the party assaulted." L.R. 1 C.C.R. 95.

In a more recent case, at the Durham Assizes, November 23, 1895, the opposite view was taken by Grantham, J., the presiding judge; *R.* v. *Hilton* (1895), 59 J.P. (Eng.), 778. In that case it appeared that the defendant Hilton was indicted for the manslaughter of one Robert Jackson. The alleged assault which caused the death of Jackson

Note—*Continued.*

occurred on the 12th of October. On the 21st of October cross-summonses for assault were heard by the justices and both cases were dismissed. At that time the deceased man's injuries were not considered serious, but on the 2nd of November he died from the effects of a clot of blood on the brain. Hilton was thereupon charged with manslaughter. Counsel for the prisoner produced a certificate of dismissal of the charge of assault by the justices under 24 & 25 Vict., c. 100, s, 45, and raised the plea that the prisoner had already been acquitted of the charge of assault and could not be tried again. The learned judge accepted this view, and the prisoner was discharged.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE McCOLL, C.J., IRVING AND MARTIN, JJ.

THE QUEEN v. LITTLE.

Certiorari—Costs awarded in favor of the Crown—Practice in British Columbia—Constitutional law—Validity of provincial statute creating offence—Leave to appeal to Imperial Privy Council.

1. The practice in Certiorari proceedings of never awarding costs either in favor of or against the Crown is to be considered as no longer in force in British Columbia.

2. Leave to appeal to the Judicial Committee of the Privy Council upon a question of the constitutionality of a provincial statute will, except under special circumstances, be refused to the party convicted thereunder whose conviction has been affirmed in certiorari proceedings, if an appeal to the Privy Council is pending in a civil action between other parties in which the same question is being litigated.

DECIDED: November 10, 1898.

Appeal from the order of Walkem, J., made 11th July, 1898, dismissing the application of Francis Dean Little, for a writ of *certiorari* to remove into the Supreme Court for the purpose of having the same quashed, his conviction made 28th April, 1898, by James Abrams and H. P. Collis, justices

of the peace, for that he as Manager of a certain coal mine of the Union Colliery Company of British Columbia, Limited Liability, at Union, B.C., did allow to be employed a certain Chinaman, to wit, Ah Sing, in the said coal mine, below ground, contrary to the provisions of the Coal Mines Regulation Act and Amending Acts.

The grounds of the appeal were:

"That section 4 of the Coal Mines Regulation Act, being Cap. 138 of the Revised Statutes of British Columbia, 1897, in so far as the same provides that no Chinaman shall be employed or allowed to be for the purpose of employment in any mine to which the said Act applies, below ground, is unconstitutional and *ultra vires* of the Provincial Legislature of British Columbia, as being an interference in the matter of aliens beyond the power of the Legislature."

The appeal came on before McColl, C.J., Irving and Martin, JJ., 10th November, 1898.

Cassidy, for appellant, stated that the same point had been decided, *In re The Coal Mines Regulation Amendment Act, 1890*, and reported in 5 B.C.R. 306, and that judgment had been followed in *Brydon* v. *Union Colliery Company*, which had been appealed to the Privy Council, which appeal is still pending. He asked that no order be made against his client for costs, as the prosecution was by the Crown merely and was not a private prosecution, and it was an old rule both here and in England that the Crown neither asks for nor pays costs.

Martin, A.-G., asks for the costs of the appeal.

McColl, C.J.—

The appeal must be dismissed with costs. The old rule was as stated by Mr. Cassidy, but it has been broken into of late years.

Irving and Martin, JJ., concurred.

Cassidy, then asked for leave to appeal to the Privy Council, but this was refused as the same point is now before the Privy Council in *Brydon* v. *Union Colliery Company*, the

Court intimating that under such circumstances the leave would not be granted except for special reasons.

Appeal dismissed with costs.
Leave to appeal refused.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR WILLIAM MEREDITH, C.J. C.P., ROSE AND MACMAHON, JJ.

THE QUEEN v. LYON.

Demand with menaces—Proof of intent to steal—Debtor and creditor — Collection agent— Threatening the arrest of debtor—Cr. Code 305, 404.

1. To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtors arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest.

2. The procuring of possession of goods by a creditor by means of a threat of the debtor's arrest does not constitute "theft" or "stealing" under Cr. Code, sec. 305, if done only for the purpose of holding the goods as security for an overdue debt, as in such case the taking is with "colour of right."

ARGUED: April 5, 1898.

DECIDED: June 29, 1898.

Motion to make absolute a rule nisi to quash the conviction of the defendant by the police magistrate for the city of Toronto for that he, the defendant, did, "with menaces, demand, take, and carry away, with intent to steal, from one Leon Easton, one bicycle, one coffee mill, one set of scales, one scoop, a number of account books, one stove, and other articles, the property of the said Leon Easton, contrary to the form of the statute in such cases made and provided." The principal ground of the motion was that the evidence dis-

closed no intent to steal, as required by the statute, sec. 404 of the Criminal Code, 1892, which is as follows :—

"Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it."

W. R. P. Parker, for the defendant, cited *Rex* v. *Hall* (1828), 2 Russell on Crimes, 6th ed., p. 83; *Rex* v. *Williams* (1886), 7 C. & P. 354; *Regina* v. *Boden* (1844), 1 C. & K. 395; *Regina* v. *Hemmings* (1864), 4 F. & F. 50; *Regina* v. *Wade* (1869), 11 Cox C.C. 549; *Regina* v. *Johnson* (1857), 14 U. C. R. 569; *The State* v. *Hammond* (1881), 41 Am. R. 791.

J. R. Cartwright, Q.C., for the Crown, contra, cited *The Queen* v. *McGrath* (1869), L.R. 1 C.C.R. 205; *Regina* v. *Robertson* (1864), Leigh & C. 483.

TORONTO, June 29, 1898.

MEREDITH, C.J. (dissenting)—

The prisoner was convicted before the police magistrate for the city of Toronto of an offence against sec. 404 of the Criminal Code, 1892.

The prosecutor owed an account to a firm of Steel, Hayter & Co., and the prisoner, who was a collecting agent, was employed by the firm to collect it, and it was when the prisoner went to the prosecutor's place of business to collect the account that the offence of which he has been convicted is alleged to have been committed. There was a conflict of testimony as to what took place on that occasion, but the police magistrate, no doubt, accepted the statement of the prosecutor in preference to that of the prisoner. What took place was, according to the prosecutor's statement, as follows: —The prisoner requested payment of the account, and was informed by the prosecutor that he could not pay it then; the prisoner thereupon shut the door, and said three or four times that if the prosecutor opened it, he, the prisoner, would

have him arrested on sight; the prisoner further said that if the prosecutor did not pay the account, he would have him arrested; the prisoner demanded the goods of the prosecutor, some of which had not been purchased from Steel, Hayter & Co., and to none of which they were entitled. The prosecutor swore that, being frightened by the threats and conduct of the prisoner, he acquiesced in the demand made by him, and some of the goods were taken away by the prisoner. The prosecutor says nothing as to the goods being demanded as security for the account of Steel, Hayter & Co., and it may be that the police magistrate disbelieved the statement of the prisoner that they were given and received in that way, as he evidently disbelived his other statements when they were contradicted by the prosecutor; and it may well have been found by the police magistrate that the prisoner knew that he had no right to have the prosecutor arrested, and that there was no cause for his being arrested, and that he knew that he had no right to take the goods, even as security for the debt, without the consent of the prosecutor.

Such being the evidence in and the nature of the case, the sole question for consideration is, was there any evidence of an intent to steal the goods within the meaning of sec. 404; for, if there was, the conviction was right, and ought to be affirmed.

I am unable to agree in the view that if the goods were demanded as security for a real debt due by the prosecutor to the prisoner's employers, the inference that the intent of the prisoner in demanding them with menaces was to steal them could not be drawn, though, even if that be so, it does not, in my opinion, affect the case, because, as I have pointed out, the statement that the goods were agreed to be given as security for the debt may have been, and probably was, disbelieved by the police magistrate.

In all the cases which have been referred to as supporting the proposition I have just mentioned, unless it be *Rex* v. *Williams* (1836), 7 C. & P. 354, the ground upon which the prosecution failed was that the accused had a legal right to the thing demanded, or demanded or sought to take it under

some colour of right. In *Regina* v. *Johnson* (1857), 14 U. C. R. 569, the demand was of payment of money which was egally due to the accused by the person upon whom the demand was made.

Regina v. *Hemmings* (1864), 4 F. & F. 50, was a similar case.

In *Regina* v. *Boden* (1844), 1 C. & K. 395, though the accused had no legal right to take that which he sought to take by force from the person in whose possession it was, he was acquitted of assault with intent to rob because, as Baron Parke ruled, there was too much semblance of a right to claim the sovereigns attempted to be taken, to justify proceeding with the case for the felony (p. 397).

Rex v. *Williams* (1836), 7 C. & P. 354, which was a case of false pretences, seems at first sight to support the contention of the prisoner's counsel. There the accused had obtained from the wife of the prosecutor a quantity of malt upon the pretence that his master had bought it from the husband, which was untrue; the intention of the accused was to obtain the malt to secure his master the means of paying himself a debt due to him by the prosecutor, of which the master was unable to obtain payment. The accused was acquitted by the jury, after a summing up by Mr. Justice Coleridge in which he told them that if they were satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it would be their duty to find him not guilty.

It will be observed that it was left to the jury to find what the intent was; they were not directed to acquit.

In the case in hand, the police magistrate, it is not unreasonable to assume, having directed his mind to the like consideration to which the attention of the jury was directed in the *Williams* case, has found that the intent of the prisoner was to steal the goods.

Referring to the *Williams* case, Chief Baron Pollock, in *The Queen* v. *Hamilton* (1845), 1 Cox C.C. at p. 247, says: "The defendant believed, however erroneously, that he had

some sort of right to do as he did, and this was probably the ground on which the jury acquitted him."

The element of belief, however erroneous, of the prisoner in this case that he had some sort of right to do as he did, is wanting, for the reason I have already mentioned, and the *Williams* case is therefore no authority in his favour.

The application of *The Queen* v. *McGrath* (1869), L. R. 1 C. C. R. 205, cited by Mr. Cartwright, is open to question, because in that case there was no real debt, but a sham one, fraudulently set up in order to enable the accused to make his demand effective. But in *Regina* v. *Lovell* (1881), 8 Q. B. D. 185, which was decided on the authority of the former case, the person upon whom the demand was made really owed the accused for a service which he had performed for her, though he demanded a sum much in excess of what he was entitled to, and made the threats which he used in order to compel payment of this dishonest claim.

I do not see, assuming that the prisoner in this case knew that he had no right to obtain the goods in question from the prosecutor in the way in which he did obtain them, as found by the police magistrate, and that his threat of arrest was conceived for the purpose of enforcing his unfounded demand, how, morally, or in its legal aspect, his acts differ from those of the prisoner in the *Lovell* case.

It is unnecessary for me to say, and immaterial to consider, whether I should on the facts have arrived at the same conclusion as that to which the police magistrate came as to the sufficiency of the evidence; his judgment and not mine must govern. My only right to interfere depends upon there having been no evidence to warrant a finding against the prisoner, and I am not satisfied of that; and the result therefore is, that, in my opinion, the conviction should be affirmed.

I refer also to *Regina* v. *Walton* (1863), Leigh & C. 288; *Regina* v. *Gibbons* (1898), 34 Can. Law Jour. 428, [1 Can. C. C. 340.]

ROSE, J.—

We must take it for granted, I suppose, that the magistrate has found that the indebtedness of the complainant to Steel,

Hayter & Co., was only a simple contract debt, and that neither that firm nor the defendant had any lien or charge upon nor any right to take the goods of the complainant that were taken possession of either by the defendant or by the firm. As a matter of fact, it would appear from the evidence that the defendant took away only the bicycle and the keys of the complainant's premises, and that Steel, Hayter & Co. took away the rest of the goods. It must also be assumed that the magistrate found that the complainant had not done any act which justified the defendant in threatening to have him arrested, and that the defendant had no honest belief that the complainant was liable to arrest; further, that this threat was a menace which might reasonably affect the complainant, and did in fact so affect him as to take away from him the power to exercise his judgment, or, to use the words of Lord Ellenborough, C. J., in *The King* v. *Southerton* (1805), 6 East 126, 140, "the threat was of such a nature as was calculated to overcome a firm and prudent man." The words of the section being that "everyone is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it," it would make no difference that the defendant demanded the goods for his employers and not for himself, and it would be sufficient, of course, within the literal wording of the section, to prove a demand, although the demand did not result in acquiescence; but here the bicycle, at least having been obtained by the defendant in consequence of the threat, one need not further pursue such question. The magistrate must also have found, in order to support the conviction, that this demand was made with intent to steal the goods; and having regard to the definition of theft or stealing in sec. 305 of the Code, that the intent was to fraudulently and without colour of right take the goods or convert them to the use of either the defendant or his employers. The conviction is that the defendant did "with menaces, demand, take and carry away, with intent to steal, from Leon Easton, one bicycle, one coffee mill, one set of scales, one scoop, a number of

account books, one stove, and other articles, the property of the said Leon Easton, contrary to the form of the statute in such cases made and provided."

As I have pointed out, the defendant personally did not take and carry away more than the bicycle; but having regard to the wording of the statute, that possibly makes no difference, save that the conviction may not strictly be in accordance with the facts.

The question, then, is whether there is any evidence at all of intent to steal, that is, to fraudulently take or convert these goods. The complainant was indebted to Steel, Hayter & Co. The amount of the indebtedness was apparently in dispute. The complainant said it was $31.66; the defendant said that the account placed in his hands for collection was some $88. It is not shewn that the defendant knew what the correct amount was, and so nothing can be made on the evidence of a demand for a larger amount. The defendant had the right to demand payment of the account, and he had a right to obtain payment or security. And if the defendant, without any threat, obtained the goods in question, of course he would not only not have done anything that was reprehensible, but he would have simply done his duty towards his employers.

The demanding of the goods must on the facts be taken to have been a demand by way of obtaining payment or security. In my opinion the evidence is not open to any other view. There would have been no fraud whatever in obtaining the goods for the purpose of paying or securing the debt, and, unless the threat of the criminal proceedings in itself was wrong, I do not see any wrong that the defendant did. In other words, it seems to me that there is an entire lack of evidence to shew any intent to steal, or, in other words, any intent to fraudulently, and without colour of right, take or convert the goods in question.

The intent was not primarily to obtain the goods, but to obtain money in payment of the debt, and the goods were only demanded to compel or enforce such payment. The intent in making the threat was not to defraud but to com-

pel the debtor to do what it was his duty to do, *i.e.*, pay his creditor what he owed him. The means taken were reprehensible, but that did not change the intent.

I refer particularly to the cases of *Regina* v. *Boden* (1844), 1 C. & K. 395, and *Regina* v. *Hemmings* (1864), 4 F. & F. 50; and to secs. 202 and 203 of Russell on Crimes, 9th Am. ed., vol. 5, ch. 3.

In my opinion, the conviction cannot be sustained.

MACMAHON, J.—

The motion is to quash a conviction made by the police magistrate for the city of Toronto, convicting the defendant of having, at the city of Toronto, by menaces and threats, taken and carried away, with intent to steal, from Leon Easton, one bicycle, one coffee mill, one set scales, one scoop, one stove, a number of account books, and other articles, the property of the said Leon Easton.

The evidence shews that the defendant is a collecting agent, and was intrusted by the firm of Steel, Hayter & Co. with the collection of an account against the prosecutor amounting to $89.46, of which $31.66 was overdue, and that the defendant threatened that unless payment was made or security given on the goods in Easton's shop for the amount of the account, he would have Easton arrested; and Easton stated that, being frightened by the threats, he gave the defendant the bicycle and the keys of the shop, and the defendant took possession of and delivered the bicycle and the keys of Easton's shop to Steel, Hayter & Co., and that firm afterwards removed from the shop the other property mentioned in the indictment, valued at about $100.

Section 404 of the Code, under which the defendant was convicted, provides that: "Every one is guilty of an indictable offence and liable to two years' imprisonment, who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it."

The defendant, having a valid claim for collection against Easton, was simply carrying out the instructions of his princi-

pals in demanding payment or insisting upon security being given; and if he made use of a threat to have Easton arrested merely to obtain security, that would not of itself bring him within sec. 404—there must exist, in addition thereto, the essential ingredient, "the intent to steal." And "stealing" is defined by sec. 305 to be "the act of fraudulently *and* without colour of right taking, or fraudulently *and* without colour of right converting to the use of any person, anything capable of being stolen." And, although the police magistrate has found the existence of such intent, the evidence is wholly opposed to such finding.

The defendant, on obtaining possession of the bicycle, immediately handed it over to Steel, Hayter & Co. as part of the security he had obtained for their claim, together with the keys of the shop which he had procured from Easton. So that all the defendant did was done for the benefit of Steel, Hayter & Co., and to obtain security for their claim. And the design being to obtain security for a debt due his employers, the procuring for that purpose possession of the bicycle even by means of a threat would not constitute theft; for the right of Steel, Hayter & Co. to obtain payment or security for their debt admittedly existed, and what was done by the defendant was, therefore, with colour of right; while, as above defined, to constitute theft or stealing, colour of right must be absent. It would have been fraudulent and without colour of right, had possession of the goods been obtained by means of a threat, if no debt existed: *The Queen* v. *McGrath* (1869), L.R. 1 C.C.R. 205. The evidence of any intent on the part of the defendant to fraudulently and without colour of right convert to the use of his employers the goods in question, was wanting.

In *Regina* v. *Johnson* (1857), 14 U.C.R. 569, where the prisoner, who had a claim against the prosecutor, put his hands in his pockets, saying he had a pair of pistols, and if the prosecutor did not give him the money he would blow his brains out, it was held that demanding money actually due with menaces is not a demand with intent to steal. And in *Rex* v. *Williams* (1836), 7 C. & P. 354, where the prisoner

was indicted for obtaining two sacks of malt from one Mary, the wife of Peter Williams, it appeared that the prosecutor, Peter Williams, owed John Williams, the prisoner's master, a sum of money, of which John Williams could not procure payment; and that the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in her husband's absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away; and that thereupon the prosecutor's wife delivered the two sacks of malt to the prisoner, who carried them to his master. It further appeared that the pretence was false, and that the prisoner knew it to be false at the time he used it. Coleridge, J., in charging the jury, said: "It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud Peter Williams." See also *Regina* v. *Boden* (1844), 1 C. & K. 395.

In *The Queen* v. *McGrath* (1869), L. R. 1 C. C. R. 205, cited by Mr. Cartwright, the prisoner was an auctioneer at a mock auction, and knocked down some cloth to the wife of the prosecutor, for which she had not bid. The prisoner refused to allow her to leave the room until she paid for it; she paid $26 for the cloth because she was afraid. She took the cloth away with her. There is a marked distinction between that case and the present. In *The Queen* v. *McGrath* there was no debt and therefore no valid claim for the sum demanded by the prisoner. The money was obtained by fraud and duress. In the present case there was an admitted valid claim, for which the creditors of the prosecutor had a right to demand payment or get security.

There must be judgment for the defendant quashing the conviction.

Conviction quashed.

Note: *Menaces—Intent to steal—Cr. Code, 404.*

See *The Queen* v. *Gibbons*, decided by the Court of Queen's Bench of Manitoba, reported 1 Can. C.C. 340, and note to same p. 350.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROSE, J.

THE QUEEN v. T. EATON COMPANY, LIMITED.

Trade Mark—False trade description—Corporation—Jurisdiction of magistrate—Cr. Code, 448, 450, 635.

1. Magistrates have no summary jurisdiction to adjudicate upon a charge under Cr. Code sec. 448 of selling goods to which a false trade description was applied.
2. Proceedings upon such a charge against a corporation should be instituted by indictment under Cr. Code secs. 635-639, and not by a preliminary inquiry before a magistrate.

ARGUED : July 19, 1898.

DECIDED : August 1, 1898.

Application for a prohibition directed to the deputy police magistrate of the city of Toronto, to prevent him and one Edward M. Trowern, the informant or complainant, from proceeding with a preliminary inquiry against the defendants.

The defendants, a joint stock company, were charged under section 448 of the Criminal Code with selling certain goods to which a false trade description was applied and the deputy police magistrate was proceeding to hold a preliminary investigation in the police court when the defendants objected to his jurisdiction on the grounds: (1) that the offence charged could only be prosecuted by indictment ; (2) that the defendants being a corporation could only be prosecuted by indictment.

The magistrate overruled both objections.

Maclaren, Q.C., for the motion.

Cavell, for the informant.

TORONTO, August 1, 1898.

ROSE, J.—

Section 448 of the Criminal Code is relied upon to support the proceeding against the defendant corporation here.

It provides that every one is guilty of an indictable offence who does any one of the things named in the section.

It is urged on behalf of the corporation that this does not warrant summary proceedings.

Section 450 provides for punishment as follows: "Every one guilty of any offence defined in this part is liable (*a*) on conviction on indictment to two years' imprisonment," etc.; "(*b*) on summary conviction, to four months' imprisonment," etc.

Section 451 provides: "Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars, who falsely represents that any goods are made by a person holding a royal warrant," etc. Section 452 also provides for punishment on summary conviction.

It is clear, therefore, that there are offences which under part 33 of the Code it was contemplated to punish by proceedings on indictment and also others on summary proceedings.

The offence is a statutory one, and entirely apart from the question of the defendant being a corporation, I think the proceedings should be by indictment. It is not now, therefore, necessary to consider whether in any case a corporation can be proceeded against summarily. Mr. Justice Robertson considered that question in *Re Chapman and The Corporation of the City of London* (1890), 19 Ont. R. 33. See also Burn's Justice of the Peace, 30th ed., vol. 3, p. 6, as to a corporation in its corporate capacity being the object of an indictment.

Sections 635-9 of the Code provide for proceeding against a corporation by way of indictment and give a procedure in case of the non-appearance of the corporation.

I think that the motion for prohibition must be made absolute, with costs to be paid by the informant.

The case of *Starcy* v. *The Chilworth Gunpowder Manufacturing Company* (1889), 17 Cox C. C. 55, was referred to on behalf of the prosecution. The statute under which that prosecution was had expressly states that "the expressions 'person,' 'manufacturer, dealer or trader,' and 'proprietor'

include any body of persons corporate or unincorporate." But I do not further examine that case, as I rest my judgment upon the ground stated.

Order for prohibition.

Note: *Corporations—No preliminary inquiry against, for indictable offence—Proceedings for indictment—Cr. Code 635, 639, 641.*

Prohibition may issue to a Court exercising criminal jurisdiction as well as to a Civil Court. *R.* v. *Herford*, 3 El. & El. 136, per Cockburn, C.J.

A justice of the peace cannot compel a corporation to appear before him in respect of an indictable offence, nor can he bind the corporation over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor to present an indictment against the corporation. *Re Chapman* v. *City of London* (1890), 19 Ont. R. 33.

As there is no jurisdiction to bind over the prosecutor to prefer a bill of indictment before the Grand Jury against a corporation, it is necessary that such an indictment should be preferred—(1) by the Attorney-General, or (2) by someone preferring the indictment by the direction of the Attorney-General, (3) or with the written consent of the Attorney-General, (4) or with the written consent of a judge of any Court of criminal jurisdiction, or (5) by a person authorized to do so by the Court of criminal jurisdiction before which the indictment is sought to be preferred. Cr. Code 641 (2). It is not necessary that the consent or order should be stated in the indictment. Cr. Code 641 (3).

A corporation must appear by attorney and plead or demur to an indictment (Cr. Code 635) and in default the trial may proceed in the absence of the defendant. Cr. Code 639. By sec. 641 of the Cr. Code an objection to an indictment for want of the consent or order required by law in order to prefer an indictment, must be taken by motion to quash the indictment before the accused *person* is *given in charge* (sec. 641, s.s. 3). By sec. 3 of the Code the word

Note—*Continued.*

'person' includes, unless the context requires otherwise, a body corporate, societies, companies, etc., in relation to such acts and things as they are capable of doing and owning respectively, sec. 3, s.s. (*t*). It may be considered as doubtful whether or not a corporation can be properly said to be 'given in charge' of the jury, and consequently whether the time limited by s.s. 3 of sec. 641 applies to indictments of corporations.

[COUNTY COURT JUDGE'S CRIMINAL COURT FOR KINGS COUNTY, NOVA SCOTIA.]

BEFORE CHIPMAN, COUNTY JUDGE.

THE QUEEN v. NEWCOMB.

Dead body—Neglect of duty to bury—Duty undertaken by person not under legal obligation—Cr. Code 206.

1. The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intent is an indictable offence under Cr. Code sec. 206, although such person was, apart from such undertaking, under no legal obligation in respect of the burial.

DECIDED: December, 1898.

The prisoner had elected to be tried without a jury under sec. 767 of the Cr. Code and had pleaded not guilty to the following accusation brought under sec. 206 of the Cr. Code: "That Edward Newcomb on or about the 28th day of November, 1898, at Cornwallis, in the said County of Kings, without lawful excuse did neglect to bury the dead body of the infant female child of Laleah Porter. Also that the said Edward Newcomb on the date aforesaid at Cornwallis aforesaid having undertaken to bury the dead body of the female infant child of Laleah Porter without lawful excuse did unlawfully neglect to bury the said dead body of the said female infant child. Also that the said Edward Newcomb on the date aforesaid at Cornwallis aforesaid having undertaken to bury the dead body of the female infant child of Laleah Porter

without lawful excuse did unlawfully neglect to decently cover the said dead body of said child and carry the said dead body of said child from the premises of George Sherman, on Church Street in Cornwallis aforesaid, where it lay, to the cemetery or other proper enclosure and there put said dead body of said child under the ground."

The facts appearing in evidence were as follows: Prisoner and Laleah Porter had been living together about one year. The infant child was illegitimate and the prisoner was its father. The child died at the house of George Sherman. The prisoner took child soon after death, wrapped it in a blanket and started away from Sherman's with it. The prisoner said he was going to have it buried, and he took the body and laid it under a bush in a field on top of the ground, where it lay from Monday morning until Friday night.

After his arrest the prisoner indicated to the constable where the body might be found.

Sec. 206 of the Cr. Code, 1892, provides as follows:

Every one is guilty of an indictable offence and liable to five years' imprisonment who—

(*a*) Without lawful excuse neglects to perform any duty either imposed upon him by law or *undertaken by* him with reference to the burial of any dead human body or human remains; or

(*b*) Improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

H. H. Wickwire for the Crown.

W. P. Shaffner for prisoner.

KENTVILLE, N.S., December, 1898.

JOHN P. CHIPMAN, County Judge—

Every dead human body is entitled to a decent burial which implies the carrying of the body decently covered to the grave. The child being illegitimate no duty was imposed upon the prisoner by law to bury it; prima facie, that duty

rested on Sherman in whose house it died. But the prisoner having undertaken to bury the body is properly found guilty under above sec. 206 of the Criminal Code. Am. & Eng. Ency. of Law 2nd ed., Vol. 8, p. 838; *Reg.* v. *Stewart*, 12 Ad. & El. 776.

Prisoner convicted.

Note: *Dead body—Neglect to bury—Criminal liability.*

The burial of the dead is an act of necessity, and the common law casts upon the individual under whose roof a poor person dies, the duty of carrying the remains decently covered to the place of burial. He cannot keep the body unburied, nor do anything which prevents Christian burial. He cannot, therefore, cast it out so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry the body uncovered to the grave. 8 Am. & Eng. Ency. of Law, 2nd ed. (1898) 838; *R.* v. *Stewart* (1840) 12 Ad. & El. 773; *Gilbert* v. *Bussard* 2 Hagg. Cons. Rep. 333; *Patterson* v. *Patterson* 59 N.Y. 574, 17 Am. Rep. 384.

It is the duty of the surviving husband to bury the corpse of his wife, and of the widow to bury the body of her deceased husband; 8 Am. & Eng. Ency. of Law 2nd ed. 838; and of a father to provide for the funeral of his child if he can in any lawful way procure the means of so doing; *R.* v. *Vann* (1851) 5 Cox C.C. 379; 2 Den. C.C. 325.

To leave a dead body exposed in a highway is an indictable nuisance. *R.* v. *Clark* 15 Cox C.C. 171.

To cast a dead body into a river without the rites of Christian sepulture is an indictable offence. *Kanavan's Case*, 1 Me. 226.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROSE AND MACMAHON, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. VAHEY.

Seduction—Girl between 14 and 16—Evidence—Corroboration —Cr. Code 181, 684 (c.)

1. Evidence of the girl's pregnancy, and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute corroborative evidence "implicating the accused" required by Cr. Code sec. 684, in order to sustain a conviction.

ARGUED : January 16, 1899.

DECIDED : January 16, 1899.

Case reserved for the opinion of the Court of Appeal, by Falconbridge, J., presiding at the Ottawa Sittings of Assize in January, 1898. The defendant had been found guilty by the jury under sec. 181 of the Criminal Code, of having on the 21st day of October, 1897, at the township of March, in the County of Carleton, unlawfully seduced and had illicit connection with one Mary Violet Lewis, a girl of previously chaste character, then being under the age of sixteen and over the age of fourteen years.

Section 181 of the Criminal Code is as follows :

181. Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years.

Sec. 684 of the Code enacts that "no person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated *in some material particular* by evidence *implicating the accused* : * * *

(*c*) Offences under part XIII., sections, 181 to 190 inclusive."

The learned trial judge was of opinion that there was sufficient corroboration of the evidence of the girl, because of proof of her pregnancy, and because in his opinion it had been "very clearly proven that it was hardly probable and in fact next to impossible that any other man than the defendant was responsible for it."

Sentence was deferred pending the hearing of the reserved case, and an order made admitting the prisoner to bail, meanwhile, himself in $10,000 and two sureties in $5,000 each.

The case reserved by FALCONBRIDGE, J., was as follows:

The prisoner was tried before me on the 12th day of January, 1898, at the Assizes for the County of Carleton, held at the City of Ottawa, on an indictment which charged him with having had illicit connection with one Mary Violet Lewis, contrary to section 181 of the Criminal Code, on the 21st day of October, 1897, and on two subsequent occasions. At the trial in addition to the evidence of the said Mary Violet Lewis, evidence was given to the following effect by her parents and a medical man:

The father of the complainant gave evidence to the effect that his daughter often went to Vahey's to keep Mrs. Vahey company while her husband was away, and that she never went anywhere else either for a visit or to work. The last time she went to Vahey's was the 14th of October, 1897, where she remained two months all but six or seven days. After her return home he took her to the doctor at the instance of his wife. He said he had kept himself informed of her movements as well as he could, and that although she had been in the company of young men, he did not know of any young man having an opportunity to have improper knowledge of her, and that he could not account for her condition unless her story was true.

Jane Lewis, the complainant's mother, said she did not know of her daughter keeping company with any young man, or any man. She said she remembered her daughter having

her courses on October 10th before she went to Vahey's, and she did not remember her having them after that time. When her daughter returned from Vahey's she had failed a good deal, and the witness had her go to the doctor. After her daughter had been at the doctor's she questioned her about the matter and she said Vahey had done it. When asked in cross-examination how she knew her daughter had not been with other men while she was at Vahey's, she said her daughter told her she had not. The mother was not cross-examined as to the fact of her daughter having her courses last on October 10th, nor was she or her husband cross-examined except as above as to how they knew their daughter had not been with other men while she was at Vahey's.

Dr. Groves, the family physician of the girl's family gave evidence that on December 21st, the girl's father brought her to his office and he, the Doctor, thought she was pregnant, but he did not examine her particularly. He asked her when was the last time she was unwell, and she said September 10th. On her return to him on December 31st he made a close examination and found what he believed to be good evidence of pregnancy. She told him she had made a mistake in her last visit and that it was the 10th of October and not the 10th of September that she was last unwell. He further said that in his opinion she was pregnant, and that the pregnancy began subsequent to September.

At the request of counsel for the prisoner I have reserved for the consideration of the Court of Appeal, being a Divisional Court of the High Court of Justice, the question whether upon the evidence summarized above there was sufficient corroboration of the complainant's testimony to satisfy section 684, sub-section (*c*) of the Criminal Code.

TORONTO, January 16, 1899.

DuVernet, for the prisoner, referred to *R.* v. *McBride*, 26 Ont. R. 639; *R.* v. *Farley*, 8 C. & P. 106; *R.* v. *Webb*, 6 C. & P. 595; *R.* v *Wilkes*, 7 C. & P. 272; *Wiederman* v.

Walpole (1891), 2 Q.B. 534; Phipson on Evidence, 2nd ed., 160, 482; Roscoe's Crim. Evid., 11th ed. 124.

J. R. Cartwright, Q.C., Deputy Attorney-General, for the Crown.

THE COURT held that the evidence of the complainant had not been sufficiently corroborated to satisfy sec. 684 of the Criminal Code, and quashed the conviction.

Conviction quashed.

Note:—*Seduction—Corroborative Evidence—Cr. Code 684.*

In a charge of forgery, to which the same section of the Code applies, it was held that the corroboration must be that of another witness, and not merely the evidence of the same witness on another point. *R.* v. *McBride*, 26 Ont. R. 639.

The "corroboration" necessary under the English Bastardy Acts must be of a nature similar to that required of the evidence of an accomplice. *Hodges* v. *Bennett*, 5 H. & N. 627. The testimony of an accomplice must be corroborated both as to the circumstances of the crime and the identity of the accused. *R.* v. *Farlar*, 8 C. & P. 106; *R.* v. *Stubbs*, 25 L.J.M.C. 16; Phipson on Evidence, 2nd ed. (1898) 482. There should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it. Roscoe's Crim. Evid., 11th ed. 124.

The evidence of an accomplice must be corroborated as to some material fact or facts which go to prove that the accused was connected with the crime charged. Russell on Crimes, 6th ed. (1896) vol. 3, p. 646; *R.* v. *Webb*, 6 C. & P. 595; *R.* v. *Addis*, 6 C. & P. 388; *R.* v. *Wilkes*, 7 C. & P. 272.

[COUNTY COURT OF NEW WESTMINSTER, BRITISH COLUMBIA.]

BEFORE BOLE, J., SITTING AS AN EXTRADITION JUDGE.

Re OCKERMAN.

Extradition—Convention of 1889 with U.S.A.—Embezzlement —Foreign Depositions—Irregularity—Confession— Admissibility—R.S.C. (1886), c. 142— Cr. Code, 592.

1. Depositions taken in the foreign state, which are certified to have been sworn to at a date subsequent to that of the foreign warrant of arrest are irregular, and extradition will not be granted on such evidence alone.
2. To justify the admission in evidence in extradition proceedings of an alleged confession of the prisoner, it must be affirmatively proved that such confession was free and voluntary, and was not preceded by any inducement held out by a person in authority, or was not made until after such inducement had clearly been removed.

DECIDED: March 19, 1898.

Application for extradition of one Ockerman upon a charge of having, at the City of Portland, in the State of Oregon, U.S.A., embezzled certain property of the Benevolent Order of Elks.

W. J. Bowser, for the prosecution.
Charles Wilson, Q.C., and *J. H. Senkler*, for the accused.

NEW WESTMINSTER, B.C., March 19, 1898.

BOLE, Co. J.—

In this case Mr. Bowser, representing the State of Oregon, applies under R.S.C. (1886), cap. 142, for a warrant of committal under the Extradition Acts. The accused was, it appears, secretary of the Benevolent Order of Elks, at Portland, Oregon, hereafter referred to as the Society, and it is alleged that in that capacity he, within the period of about five years before December, 1897, embezzled some $1,588.00,

the property of the Society. The evidence relied on by the prosecution as sufficient to justify the issue of a warrant of committal is confined (*a*) to two depositions, (*b*) to certain alleged admissions. As to the depositions it is to be remarked that the one made by Mr. Bingham was sworn on the 31st January, 1898, while the Magistrate's warrant, which was presumably to some extent founded thereon, was issued on the 18th January, 1898, and with respect to this deposition I may say, quoting the words of Lord Bramwell, it does "not condescend to particulars." It alleges that the deponent, having examined the books kept by the accused, is satisfied that between 1892 and the date of the examination there appears to be a deficiency of over $1,500.00, and that the same has not been paid to the treasurer of the Society or any other officer of the Corporation, but does not, as one might reasonably expect, give any ground or reason for his statement as to the alleged non-payment; not even stating that he received any information from the treasurer on the subject, he gives no items nor any information with respect to dates and no copy of the account is attached or referred to in the deposition, so that assuming, for argument's sake, that Mr. Bingham's bookkeeping is not at fault (and he does not give any opportunity of checking it), still the fact remains that the deponent is relying on hearsay evidence when he states that the money has not been paid over to the treasurer or the Society's officers. But, vague as Mr. Bingham's deposition is, that made by the other witness, Mr. Baker, is even more unsatisfactory, and neither of these gentlemen appear to be in a position to speak from personal knowledge as to the alleged offence of the accused. The books of the Society are not produced nor is their absence accounted for, and I think the treasurer might surely have been produced from a place so near as Portland, or at least have made a deposition: so that the case presented on the depositions cannot to my mind, be described as satisfactory.

The so-called admissions by the accused do not, I think, supply the absence of properly drawn depositions, as they were of a vague and uncertain character and not clearly shewn

to be unequivocal admissions of the offence charged. Section 592 of the Code allows the prosecutor to give in evidence admissions, confessions or statements made at any time by the person accused, which by law would be admitted against him. Now, Mr. Connor's evidence, although in terms denying that any inducement or threat was held out is with respect to the conversation between himself and the accused, of a fragmentary and incomplete kind, and while there is no reason to suppose Mr. Connor's evidence was not perfectly true as far as it went, still it is quite possible he may have forgotten much of what was said on that occasion; but, beyond the right the accused person undoubtedly has to have the whole of the conversation in which the alleged admission was made given in evidence, (Roscoe 11th Ed. p. 51), it must be also borne in mind that to make a confession by a prisoner admissible it must be affirmatively proved that such confession was free and voluntary, that it was not preceded by any inducements to the prisoner to make a statement held out by a person in authority or that it was not made until after such inducement had clearly been removed; *The Queen* v. *Thompson*, (1893) 2 Q. B. 12. This has not, I think, been proved satisfactorily, and I therefore cannot base my warrant on this part of the evidence alone.

As to the depositions already referred to I can hardly do better than quote the words of Gwynne, J., in *Re Lewis*, 6 Ont. Pr. 236 at p. 237:

"When a prosecutor who seeks to have a person arrested "in this country for committal under the Extradition Treaty, "finds it more convenient to use *ex parte* affidavit evidence "taken abroad in preference to bringing the living witnesses "for examination face to face with the accused at the hearing "of the complaint, it is the right of the accused, which "impartial justice and the letter and spirit of the law award "to him, that the minutest forms and technicalities with "which the Legislature hath surrounded the production of "this species of *ex parte* testimony shall be strictly complied "with. We have no right to deprive him of the protection "which the non-compliance with any of these forms may

"afford to him ; however heinous may be the offence with "which he stands charged, he has a right to insist that only "legal evidence shall be received against him."

I also desire to adopt the language of Mr. Justice Osler in the last paragraph of his judgment, in *Re Parker*, 9 Ont. Pr. 332 at p. 335, as applicable to this case, as also to refer to Sir Edward Clarke's work on Extradition at page 186. For the reasons already stated I am not prepared to hold that there is sufficient evidence before me to justify my issuing the warrant of committal asked for, and I think the prisoner must be discharged.

Prisoner discharged.

Note : *Extradition—Foreign Depositions as Evidence — Insufficiency of.*

It was held by Osler, J. in *Re Parker* (1882) 9 Ont. Pr. 332, that where the facts in evidence, though sufficient to warrant extradition if they had been deposed to by witnesses able to testify as to their actual occurrence, were sworn to from information only, the prisoner should be discharged. The portion of the Opinion of Osler, J., referred to and approved in the principal case is as follows :—

"I think the prisoner must be discharged. * * * I regret it, if there be really any foundation for the charge, but if parties who are concerned in prosecuting it will not take common pains to make it, and are content to rest upon depositions only, which turn out to be insufficient, they must take the consequences. * * * So long as there is an extradition law under which a criminal whose extradition is sought has rights to be observed here, he is entitled to have those rights administered by our Courts."

Sir Edward Clarke, in his work on Extradition, 2nd ed., pp. 185 and 186, says :—

"It must be remembered that the magistrate investigating a case of demanded extradition, is not quite in the same position as if he were deciding on a charge of crime committed within his own jurisdiction. In the latter case he has full discretion. He may, and often does, discharge a

Note—*Continued.*

prisoner because, although there is *prima facie* evidence of guilt, the circumstances are so obscure, the intent so doubtful, the testimony so conflicting, that he thinks a jury would not be likely to convict. But in a case of extradition he cannot consider these matters. If he find sufficient evidence of guilt to justify a commitment, the question of a probability of a conviction is not one for his consideration. But it naturally follows from this that he should be strict in requiring proof of the criminality of the acts which are charged. In an ordinary case he can commit the prisoner upon bail, and leave difficult questions of law to be dealt with by the Court above. But in an extradition case he is to ascertain, not the commission of certain acts upon whose character another and higher tribunal may decide, but that there is sufficient evidence that the crime specified in a foreign warrant has by the prisoner been committed."

Upon the review of a committal under a writ of habeas corpus the judge must see (1) whether the offence charged is or is not of a political character; (2) whether it is or is not an extradition crime; and (3) whether the proceedings are regular and justify the prisoner's committal for surrender. *Re Levi* (Que.) 1 Can. C.C. 74.

[SUPREME COURT OF NEW BRUNSWICK.]

Ex parte KAVANAGH.

Summary conviction—Variance from information—Mistake—Explanation by affidavit of magistrate—Canada Temperance Act—Forfeiture of liquor seised.

1. If by mistake an information against the same defendant on another charge for unlawfully selling intoxicating liquor is returned on a certiorari to remove the proceedings in respect of an offence of keeping liquor for sale, the magistrate's affidavit may be received to explain the apparent variance between the information and the conviction, and the conviction should not be quashed if the explanation is satisfactory.
2. Where the variance in the date of the offence as it appears in the information returned with the conviction upon a certiorari is manifestly a clerical error, and the proceedings are otherwise regular, the conviction should not be quashed.
3. An order made for the forfeiture of intoxicating liquor seized under a search warrant in proceedings under the Canada Temperance Act is bad unless there was an information upon which to base the search warrant.

ARGUED: January 29, 1896.
DECIDED: April 25, 1896.

A rule nisi for a certiorari was granted in Michaelmas Term, 1895, to remove convictions for selling and for keeping for sale intoxicating liquors, and an order for the destruction of certain liquor, made by William Dibblee, Esquire, Police Magistrate of the Town of Woodstock.

The facts sufficiently appear in the judgment.

Sections 108 and 109 of the Canada Temperance Act are amended by 51 Vict. (Can.) c. 34, ss. 10, 11 to read as follows:

108. If a credible witness proves upon oath before any one of the officers named in section 103 of this Act that there is reasonable cause to suspect that any intoxicating liquor is kept for sale in violation of the second part of this Act, or of "The Temperance Act of 1864," in any dwelling house, store, shop, warehouse, outhouse, garden, yard, croft, vessel, or other place or places, such officer may grant a warrant to search in the daytime such dwelling house, store, shop, ware-

house, outhouse, garden, yard, croft, vessel, or other place or places for such intoxicating liquor, and if the same or any part thereof is there found, to bring the same before him, and any information to obtain a warrant under this section may be in the form M in the schedule to this Act; and any search warrant under this section may be in the form N in the said schedule.

109. When any person is convicted of any offence against any of the provisions of the second part of this Act, or "The Temperance Act of 1864," the officer or officers so convicting may adjudge and order in addition to any other penalty or punishment that the intoxicating liquor in respect to which the offence was committed, and which has been seized under a search warrant as aforesaid, and all kegs, barrels, cases, boxes, bottles, packages and other receptacles of any kind whatsoever found containing the same be forfeited and destroyed, and such order shall thereupon be carried out by the constable or peace officer who executed the said search warrant or by such other person as may be thereto authorized by the officer or officers who have made such conviction.

January 29, 1896. *A. B. Connell*, Q.C., shewed cause, and *George F. Gregory*, Q.C., supported the rule.

FREDERICTON, N.B., April 25, 1896.

The following judgment was now delivered by

TUCK, J.—

Thomas Kavanagh, the defendant, was convicted before William Dibblee, Esquire, police magistrate of Woodstock, for keeping intoxicating liquor for sale, contrary to the provisions of the second part of the Canada Temperance Act. He was also convicted, before the same magistrate, for selling liquor contrary to the provisions of the said Act.

And Mr. Dibblee also made an order for the destruction of intoxicating liquor, seized under a search warrant, and found on the premises of the defendant Thomas Kavanagh. This

order was made under the form given by 51 Vict., (Can.) c. 34, ss. 108, 109 (1888).

First, as to the conviction for keeping for sale. The papers used on moving for a rule nisi for a certiorari in this case shew, that by an information made on the twenty-second day of December, 1894, at the Town of Woodstock, before William Dibblee, police magistrate, Runford Colpitts said that he was informed and believed that the defendant, on the twenty-first day of December, 1894, at the Parish of Wilmot, in the County of Carleton, unlawfully did sell intoxicating liquor, contrary to the provisions of the second part of the Canada Temperance Act.

The summons served on the defendant states that information had been laid before the police magistrate that the defendant did, within the space of three months from the twenty-second of December, 1894, to wit, on the twelfth day of December then instant, keep intoxicating liquor for sale. In the original summons the words "within the space of three months last past" have a line drawn through them. The adjudication, dated the twenty-eighth of December, 1894, is for unlawfully selling intoxicating liquor on the twelfth of December, 1894.

By the return to the writ of certiorari, it appears that the information is for keeping for sale on the twelfth of December; the summons to the defendant follows the information; and the adjudication is for keeping for sale on the twelfth of December. Judging from the return, there is no variance between the information, summons, evidence and conviction.

Mr. Dibblee, by his affidavit, sworn to on the twenty-second day of March, 1894, says: "I made the verbal adjudication against said Thomas McCafferty for keeping such liquor for sale; but in making the entry on my minutes, I used a printed form of adjudication which I had on hand, which printed form charges the party with selling liquor, and in the hurry of making the entry I at the time neglected to change the wording to keeping liquor for sale, which change I made immediately on my attention being called to it, and I told John J. Gallagher, Esquire, the counsel for

the said party, that I had made such change." "I believe the papers delivered by me to said John J. Gallagher have become transposed or mixed with the papers in another case against said Thomas McCafferty."

I think that the apparent variation between the information, summons and adjudication is satisfactorily explained in Mr. Dibblee's affidavit, and that the proceedings are regular. It is evident to my mind, that the information marked B, attached to the papers used in moving for the rule, is part of another case where a complaint had been made against the defendant. Perhaps by inadvertence it has been used in this application.

I think the conviction for keeping for sale is good and ought to stand.

It is proper that I should say here that, in moving for the rule, one ground taken was that the summons served on the defendant is directed to "Thomas McCafferty," whereas his real name is "Thomas Kavanagh." This point, however, was abandoned at the argument.

In the conviction for unlawfully selling, the information, summons, copy of evidence and adjudication, used in moving for a rule, are all for a sale on the twelfth of December, 1894, and appear to be entirely regular. The year is stated in all the papers. From an examination of the papers, I fail to see why the rule nisi for a certiorari should be made absolute in this case.

While the papers above named are all in order, the information attached to the magistrate's return has "21 day of December," instead of "12 of December," as the date of sale. I am satisfied that this is either a clerical error, or else a wrong copy of information has been annexed to the return.

I have no doubt that there was an information against McCafferty for unlawfully selling on the twenty-first of December, as well as on the twelfth. For I find that John A. Burns, who was a witness in the case, after proving a sale on the twelfth of December, says in his evidence: "I was there again the twenty-first December; I got some intoxi-

cating liquor that day at the same place. I got a drink of whiskey from McCafferty's wife, and I paid ten cents for it. I saw bottles and kegs there that day. I saw glasses there."

The rule nisi to quash, in the case for unlawfully selling, must also be discharged.

There remains the order, declaring that certain intoxicating liquor be forfeited to Her Majesty, and that the same be destroyed. The objection to this order is, that there was no information upon which to base the search warrant, which was issued by the magistrate. I fear that this objection is fatal, and that the order must be quashed. By 51 Vict., c. 34, s. 108, there is distinct provision that there must be an information in order to obtain a warrant, and a form of information is given in the Schedule to the Act. Then, so far as it appears from the return, no information at all was laid to obtain a search warrant. Time was given to file an affidavit that the necessary information had been in part made; but the time has expired, and no affidavit has been filed.

The rule must be absolute to quash the order whereby the intoxicating liquor was forfeited and destroyed.

Rules accordingly.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., FERGUSON AND ROBERTSON, JJ.

THE QUEEN
v.
ROBERT SIMPSON COMPANY, LIMITED.

Stated Case—Appeal—Offence under Ontario Statute—Pharmacy Act—Ontario Summary Convictions Act—Application of Cr. Code 900.

1. The procedure by way of "stated case" under sec. 900 of the Criminal Code is a form of appeal, and as the application of the Criminal Code to offences under Ontario statutes is declared by the Ontario Summary Convictions Act (R.S.O. 1897, c. 90, s. 2.) not to affect 'procedure on appeals,' there is no jurisdiction to proceed by 'stated case' to review a decision of a magistrate in respect of such an offence, except where the constitutionality of Provincial Acts are involved. (R.S.O. 1897, c. 91.)
2. The appeal whether of the prosecutor or of the accused is, as regards such offences, to the Court of General Sessions under the provisions of the Ontario Summary Convictions Act.

ARGUED: November 25, 1896.

DECIDED: December 12, 1896.

Case stated by the police magistrate of the city of Toronto.

The defendants are a company incorporated under the Joint Stock Companies' Letters Patent Act, R.S.O. 1887, ch. 157, for the following purposes, that is to say :—

To buy, sell, manufacture and deal in goods, wares and merchandise generally, and for the said purposes to acquire the necessary real and personal property, including the stock-in-trade and business now carried on by Robert Simpson as a departmental store, corner of Queen and Yonge streets, Toronto.

The said company has a large departmental store at the corner of Queen and Yonge streets, in the city of Toronto, and was charged before me on the information and complaint of one Alfred Brown : that the said company did, during the months of June and July, 1896, unlawfully

keep open shop at the city of Toronto, for retailing, dispensing and compounding poisons, contrary to the form of the Pharmacy Act R.S.O. 1887, ch. 151, and amendments thereto.

On the ground floor of the said store or building, a space is set apart for a drug department, which department is, and has been under the mangement of one Charles P. Lusk, a duly qualified pharmaceutical chemist, registered under the Pharmacy Act, and who had taken out a certificate under the provisions of section 18 of the said Act.

It was admitted that the said Lusk did, in said department, dispense certain drugs containing poisons, and sell certain poisons to the complainant, all of which poisons are included in schedule "A" of the Pharmacy Act and amendments thereto.

The said Lusk is the holder of one share of the stock in said company, and the position occupied by him in the said business is, that he manages the drug and patent medicine business carried on in the said store of the said incorporated company at the corner of Queen and Yonge streets in the city of Toronto; and that he sells, dispenses and compounds all the poisonous drugs and medicines required in carrying on said business. The said Lusk received for his services aforesaid, the sum of $15.00 a week. The agreement for hiring between the said company and the said Lusk, may be terminated by either party on one week's notice. All the goods, including said poisons required for the said department, are from time to time purchased by the said Lusk on his own judgment, but with the moneys or upon the credit of the said company, which said company receives the proceeds of all sales made in said department, such proceeds going into the general cash receipts of the whole departmental store.

On the foregoing facts, which were admitted, the police magistrate, in his view of the law following the case of *Pharmaceutical Society of London* v. *Provincial Supply Association*, 5 App. Cas. 857, dismissed the information and complaint of the said Alfred Brown; and his order

of dismissal being questioned by the prosecutor, on the ground that the defendants were guilty of the offence charged in the information under section 24 of the Pharmacy Act, he stated this case so that his decision on the law of the case might be reviewed by a Division of the High Court of Justice.

TORONTO, November 25, 1896.

Shepley, Q. C., for the defendant, raised the preliminary objection that the police magistrate had no power to state a case for review in respect of an alleged offence under the Pharmacy Act. The Ontario Acts, R.S.O. 1887, chs. 74 and 75, contain the complete procedure for offences under Ontario Acts. These two Acts cover the whole field of procedure in the case of summary convictions and appeals under the Ontario Statutes. Section 65 of 32 & 33 Vict. ch. 31 (Can.), provided for the right of appeal to the sessions, and this was embodied in secs. 76 and 77 of the R. S. C. ch. 178. No power is there granted to a magistrate to state a case. The first Act which gave magistrates power to state a case was 52 Vict. ch. 15, sec. 5 (Ont.). That is limited to cases where the question is as to the constitutionality of the Act under which the conviction is made. The matter is discussed in *Regina* v. *Wason*, 17 Ont. App. 221, and it is pointed out that where there is what may be termed provincial criminal law, there is the right to enact provincial procedure with regard to offences against that law. The Provincial Legislature having enacted a complete code of procedure to govern cases of this kind, including an appeal to the sessions, and limited the stating of a case to matters involving the constitutionality of Provincial Acts, they have, so to speak, occupied the field, and having in no way embodied section 900 of the Criminal Code as part of the provincial legislation, it cannot, therefore, apply to this case, being limited to offences over which the Dominion Parliament has jurisdiction. This is in substance an appeal, and therefore to apply the cognate provisions of the Code would be in effect to oust the jurisdiction of the province.

Osler, Q. C., contra. Section 1 of R. S. O. 1887, ch. 74, is quite wide enough to cover the stating of a case. It adopts the Dominion procedure "then in force", that is, in force at the time the case comes on for trial. The contention that the field, so far as the stating of a case is concerned, has been occupied by the provincial legislation, is not correct. The field there occupied is of a limited character, namely, as to the constitutionality of certain statutes, leaving all other matters open. The reason was that it was not deemed advisable that a magistrate should decide on constitutional questions. Section 1 is limited by section 2, namely, that it is not to affect the precedure on appeals. The effect of sec. 9 of R. S. O., 1887, ch. 74, is merely to delay the coming into force of the Dominion legislation until the next session of the Ontario Legislature, to enable it to legislate on the subject if it so desire, but if it does not do so, then the Dominion legislation becomes effective. The effect of section 900 of the Code is not to interfere with appeals on the evidence, but merely to provide for the statement of a case to settle the question of law involved.

TORONTO, December 12, 1896.

BOYD, C.—

In the Criminal Code of Canada, 55 & 56 Vict. ch. 29, the classification of contents gives as Title VII. "Procedure," of which part LVIII. contains all the provisions as to "Summary Convictions," embracing sections 839 to 909 inclusive. Sections 879 to 888 (also 899), relate to an appeal to the General Sessions as well upon the facts as the law (section 881). Sections 889 to 895 relate to proceedings to quash upon *certiorari*. Section 900, the one in question, is a long section containing the practice upon the statement of a case by the magistrate, in order that it may be reviewed on the ground that it is erroneous in point of law, or is in excess of jurisdiction.

The internal evidence supplied by this section is, that the proceeding is regarded and spoken of as an appeal; the

dissatisfied person is styled the "appellant"; he is to give a recognizance conditioned to "prosecute his appeal without delay." The "judgment appealed against," is mentioned. The justice is declared to be not liable for costs by reason of such appeal against his decision. And sub-section 14 provides that any person who appeals under that section 900, from which he is entitled to appeal under 879 to the sessions, shall be taken to have abandoned any appeal to the sessions. The Code, therefore, treats this method of stated case to be but a form of appeal equivalent to the ordinary appeal upon the facts and law to the General Sessions.

Now turning to the Ontario Statute as to summary convictions, R. S. O., 1887, ch. 74, it appears to incorporate into provincial law, all the enactments of the Dominion law touching procedure on such convictions, except that procedure in appeals shall not be affected. "Appeals", that is from convictions under Ontario laws, are to be lodged and prosecuted as provided by provincial enactment, and are withheld from being subject to Dominion legislation. This position covers the whole question of the right to proceed by way of stated case, which though a method given by the Criminal Code, is not extended to a summary conviction under the Pharmacy Act, R. S. O., 1887, ch. 151.

The analogous provision for stating a case in the Ontario law, found in 52 Vict. ch. 15 (Ont.), is in *pari materia* with section 900 of the Code, or as it first appears in 53 Vict. ch. 37, sec. 28 (Can.), and both are taken from the Imperial Statute 20 & 21 Vict. ch. 43, as added to by 42 & 43 Vict. ch. 49, sec. 33. These English enactments are treated of in Paley on Convictions, 7th ed., ch. 4, p. 213, under the head of "Appeal by Special Case," and are spoken of in the decisions of highest value as providing for appeals: *South Staffordshire Waterworks Co.* v. *Stone*, 19 Q. B. D. 168, approved and followed in *Lockhardt* v. *Mayor, etc., of St. Albans*, 21 Q. B. D. 188.

The preliminary objection being well taken renders it needless to examine into the merits of the appeal.

The judgment must be for the respondent with costs.

FERGUSON, J.—

When a penalty or punishment is imposed under the authority of any statute of the Province of Ontario, or of any other statute or law in force in Ontario, and relating to matters within the legislative authority of the Legislature of the Province, and is recoverable before, or may be inflicted by a justice of the peace, or a police or stipendiary magistrate, the first section of chapter 74 of the R. S. O., 1887, adopts the procedure given in the statutes of the Dominion at the time in force, unless in any Act thereafter passed, imposing a penalty or punishment, it should be otherwise declared. But it also provides that nothing in the section contained, shall affect procedure on appeals.

The alleged offence in the present case, is one for an alleged contravention of the provisions of a statute passed by the Legislature of Ontario, and no question arises as to the legislative authority to pass the Act.

This case comes before us in the form of a case stated by the magistrate professedly under the provisions of section 900 of the Criminal Code, one of the sections in the group of sections in part 58, relating to summary convictions. The language employed in various parts of this section 900, shows, as I think, clearly that such a 'case stated' is an appeal.

Then, granting that this is an appeal from the decision of the police magistrate, and turning to the provision in the Ontario Act, R. S. O., 1887, ch. 74, sec. 1, that nothing in the section contained, shall affect the procedure on appeals, the conclusion is reached that a procedure by way of stated case under the provisions of section 900 of the Code, is unauthorized.

Assuming that an appeal would lie in the present instance, it seems to me a case for an appeal under the procedure of the Province, and on such an appeal, questions of law and fact can both be determined.

The only instance in which, in the precedure of the Province respecting summary convictions, a case can be stated, is confined to very narrow ground, and is not this case, and besides such a case is necessarily presented to and heard

before the Court of Appeal. See *The Queen* v. *Wason*, 17 Ont. App. 221.

I agree in the conclusion that the preliminary objection taken by Shepley, Q. C., must prevail.

ROBERTSON, J., concurred.

Objection allowed.

Note: *Quasi-criminal law — Provincial statutes imposing penalty — Enforcement by imprisonment — Constitutional Law.*

Whatever infractions of law, whether as to matters of Dominion or Provincial legislation, Parliament sees fit to designate as *crimes*, it and it alone can so declare, and, as such, punish, and to that end regulate procedure. *Ex parte Duncan*, 2 Cart. 297; *Hodge* v. *The Queen* (1883), 9 App. Cas. 131.

Whatever infractions of any Provincial law coming within the purview of sec. 92 of the British North America Act, Parliament may not see fit thus to deal with, the interested province may punish by fine, penalty or imprisonment; but its so doing does not make the offence to be thus punished a *crime*, nor the procedure laid down in order to its punishment procedure in a *criminal matter*. *Ex parte Duncan*, 2 Cart. 297; *Pope* v. *Griffith*, 2 Cart. 291; *Page* v. *Griffith*, 2 Cart. 308; *Coté* v. *Chauveau*, 2 Cart. 311; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Regina* v. *Boardman*, 30 U.C.R. 553; *Regina* v. *Wason* (1890), 17 Ont. App. 221, 233.

A Provincial statute simply for the regulation of a particular trade or business, and for the prevention of frauds in the manner in which it is conducted, is within the power of a Provincial Legislature to enact under the term 'Property and civil rights in the Province' used in the Constitutional Act; B.N.A. Act, sec. 92(13). Amongst the subjects for federal legislation are the "Regulation of trade and commerce" and "Criminal law, including the procedure in criminal matters;" B.N.A. Act (1867), s. 91. But the phrase, "Regulation of trade and commerce," read in con-

Note – *Continued.*

nection with other portions of the British North America Act must be held to refer to regulations relating to trade and commerce in their general and *quasi* national sense, and not to the contracts or conduct of particular trades. Burton, J. A., in *Regina* v. *Wason* (1890), 17 Ont. App. 237.

And the words "Criminal law, including procedure," read in the connection in which they appear in the B.N.A. Act, mean the "general public criminal law at the time of Confederation, or such matters as may, by the Parliament of the Dominion, be declared to be criminal, and would not include such penal offences as might in accordance with popular language be comprised under the phrase "criminal law," but which it is within the power of the Provincial Legislature to punish." Ibid.

[COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE OUIMET, J.

Ex parte ROBERT EWAN.

Witness—Privilege from arrest—Offence committed by witness while away to give evidence.

1. The privilege from arrest allowed to a witness summoned before a Court sitting in another judicial district from that in which he lives, does not apply where he is charged with a criminal offence committed by him during the time in which he is in such district for the purpose of giving evidence.

MONTREAL, September 29, 1897.

OUIMET, J.—

Robert Ewan, of L'Epiphanie, in the judicial district of Joliette, alleges in his affidavit that he was summoned as a Crown witness before this Court in a case of *The Queen* v. *Thomas W. Lee and Robert Parks.* While he was here in Montreal as a witness, he was arrested on a complaint made

against him by one Deguire on a charge of perjury in giving his evidence before this Court in the case of *The Queen* v. *Lee and Deguire*. Ewan now moves to quash the warrant under which he was arrested, and for his discharge in respect of that accusation. *M. de Salaberry* for Ewan, argues that from time immemorial it has been a recognized doctrine that the subject who leaves his home in order to come and give evidence in Court has the right to the protection of the Court *eundo, morando et redundo;* until his return he is under the protection of the Court which summoned him, and he is exempt from all proceedings which would deprive him of his liberty.

Mr. Maclennan, for the private prosecutor, in the first place denies that this Court has the authority contended for to reverse, in a summary way, the proceedings of an inferior Court acting within the limits of its jurisdiction; and secondly, contends that the immunity claimed by the witness protects him only against proceedings in civil matters, and not against proceedings in respect of a criminal offence which he is alleged to have committed while so absent from home.

I am of the opinion that under the circumstances the application cannot be granted. The applicant does not charge that the proceedings complained of have been taken with the object of intimidating him, or to prevent him from giving his testimony, in which contingency there would perhaps be grounds for the intervention of the Court. Instead of protesting against his arrest and at once applying to this Court, he submitted to the arrest and obtained his liberty by giving bail, so that he has no claim to ask this Court to summarily set aside the proceedings of another tribunal which has acted clearly within the limits of its powers.

Besides, the privilege of a witness summoned before the Court, cannot protect him from the consequences of a criminal offence committed by him while he is absent from his home to give evidence.

Application rejected.

R. de Salaberry, for plaintiff.

F. S. Maclennan, for the private prosecutor.

Note: *Protection of witnesses from arrest.*

"Witnesses as well as parties are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home, *eundo morando, et redeundo.*"

This rule of protection was laid down in the case of *Meekins* v. *Smith*, 1 H. Bl. 636, as extending to all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not (in which number bail were included), provided they came bona fide. *Randall* v. *Gurney*, 3 B. & Ald. 252; *Walpole* v. *Alexander*, 3 Doug. 45. It extends to a witness coming from abroad without a subpœna. 1 Tidd's Practice 195, 196; Greenleaf on Evidence, 16th ed., sec. 316.

A subpœna is not necessary to protection, if the witness have consented to go without one, nor is a writ of protection essential for this purpose; its principal use being to prevent the trouble of an arrest and an application for discharge by showing it to the arresting officer; and sometimes, especially where a writ of protection is shown, to subject the officer to punishment for contempt. Greenleaf on Evidence, 16th ed. (1896), sec. 316, vol. I. page 507; *Meekins* v. *Smith*, 1 H. Bl. 636; *Arding* v. *Flower*, 8 T. R. 536; *Norris* v. *Beach*, 2 Johns. (N.Y.) 294.

The freedom from arrest is a personal privilege which the party may waive; and if he willingly submits himself to the custody of the officer, he cannot afterwards object to the imprisonment as unlawful. Greenleaf on Evidence, 16th ed., sec. 316; *Brown* v. *Getchell*, 11 Mass. 11, 14; *Geyer* v. *Irwin*, 4 Dall. 107.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE SIR GEORGE BURTON, CHIEF JUSTICE OF ONTARIO, AND OSLER, MACLENNAN, MOSS AND LISTER, JUSTICES OF APPEAL.

MILLER v. LEA.

Wounding with intent—Preliminary inquiry—Reducing charge to assault—Conviction by justices—Bar of Civil action—Cr. Code 262, 864, 866.

1. Justices of the peace have no jurisdiction to summarily convict for 'assault' when the only information before them is for an offence beyond their summary jurisdiction.
2. On a charge of shooting and wounding with intent, the justices holding a preliminary enquiry cannot, of their own motion, vary or reduce the charge to one of common assault and so acquire jurisdiction to adjudicate thereupon.
3. The presence of the wounded person as a witness at the preliminary enquiry in which a peace officer was the complainant, and the failure of such person to object to the charge being so dealt with by the justices, do not constitute acquiescence therein by him.
4. The wounded person being in such case a witness only, is not bound to object; and his failure to do so is not an election on his part to proceed before the justices as regards their powers of summary trial.
5. A certificate of conviction by justices for common assault under those circumstances, and the payment of the fine imposed, do not bar a civil action by the injured party for damages against the wrongdoer, and sec. 866 of the Criminal Code does not apply.

ARGUED: September 22, 1898.

DECIDED: November 15, 1898.

The action was brought to recover damages for assault. The defendant pleaded a conviction by justices of the peace for the assault, and the payment by him of the fine by them imposed.

The facts of the case are set forth in the report of the case of *The Queen* v. *Lee* (or *Lea*) reported *ante*, 2 Can. C. C., 233, and in the judgments herein. The action was tried at Toronto on the 6th day of October, 1897, before Mr. Justice MacMahon and a jury, and was dismissed by the trial judge upon the objection taken by counsel for the defendant that the claim was barred by sec. 866 of the Criminal Code. An appeal was

taken to a Divisional Court from the judgment at trial, and was heard by Armour, C. J., and Falconbridge, J., who affirmed the dismissal. The present appeal was taken against the latter judgment.

Wallace Nesbitt and *W. J. Clark*, for the appellant. The information was for an indictable offence, and section 866 of the Criminal Code does not apply. The certificate was a nullity and there was no need to quash it; *Reed* v. *Nutt* (1890), 24 Q.B.D., at p. 673; *Hancock* v. *Somes* (1859), 1 E. & E. 795. The information was not laid by or on behalf of the plaintiff: *Nicholson* v. *Booth* (1888), 16 Cox C.C. 373. The effect of the section has been considered in *Flick* v. *Brisbin* (1895), 26 Ont. R. 423, and *Nevills* v. *Ballard* (1897), 1 Can. C.C. 434; 28 Ont. R. 588.

Delamere, Q.C., and *Snider*, for the respondent. It is a question of fact whether the information was laid by or on behalf of the appellant. Upon that question of fact the Judge at the trial decided against him, and his finding has been affirmed by the Divisional Court and should not be disturbed. There is ample evidence to support it. The charge was reduced to one of assault in the plaintiff's presence and without objection by him.

TORONTO, November 15th, 1898.

BURTON, C.J.O.—

The information in this case was laid by a peace officer, presumably in the execution of his duty, against the defendant for shooting with intent to do grievous bodily harm to the plaintiff, and there was no evidence adduced at the trial to show that it was laid on behalf of the plaintiff, if that would have been material, which it would not have been, as it was a criminal charge the result of which could not affect the plaintiff's civil remedy.

If the officer had assumed to lay an information for an assault, it may be that the plaintiff by omitting to object at the hearing might have been held to ratify or affirm the

charge, but at most the omission to take objection affirmed the criminal information only and could not deprive him of his civil remedy.

If it was competent to the magistrates of their own mere motion to amend the information and change it into one for a common assault, that could not affect the plaintiff and make it his act; he was summoned as a witness and gave evidence on the criminal charge and it was immaterial to him how that charge was disposed of.

The proceedings so far as he knew were regular enough and he was bound as a law-abiding individual to attend and give evidence in support of the criminal charge and there was nothing for him to object to.

It is only where he has elected to proceed summarily for an assault that his civil remedy can be affected, and it is only in such a case that the conviction by the magistrate can be pleaded in bar of the action.

The nonsuit and its subsequent affirmance by the Divisional Court must be set aside and a new trial had.

OSLER, J.A.—

I think that the nonsuit was wrong, and that there should be a new trial. The action is in trespass for assault and battery by shooting at and wounding the plaintiff. The defendant pleads that he was convicted therefor for a common assault by two justices of the peace, and, having paid the fine and costs adjudged, is by section 866 of the Code released from "all further or other proceedings, civil or criminal, for the same cause."

The statement of defence shows that the information or charge laid against the defendant was for an offence under section 241 of the Code, viz., for shooting and wounding with intent to do some grievous bodily harm, an offence which, it is needless to say, justices of the peace have no jurisdiction to try summarily. It matters not, therefore, in the case of such an information, whether it was laid by or on behalf of the party aggrieved, or, as in the present case it was, by a constable simply in the discharge of his duty. The plaintiff

was summoned to give, and gave, evidence on the charge laid, but the justices, instead of committing the accused for trial on that charge, or on one of a lower grade, or discharging him, one of which courses alone they had jurisdiction to take, assumed to convert the charge, or, in the language of the statement of defence, to reduce it to a charge of common assault and then to dispose of it summarily by convicting the defendant.

Now, the charge or information which justices have jurisdiction to hear and determine summarily, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto, is a charge or information for what is generally spoken of as a common assault. This is apparent from section 265 and sections 864, 865 and 866 of the Criminal Code. The first of these sections enacts that every one who commits a common assault is guilty of an indictable offence, and liable, if convicted upon an indictment, to one year's imprisonment or to a fine not exceeding $100, and on summary conviction to a fine not exceeding $20 and costs, or to two months' imprisonment with or without hard labour.

In part 58 of the Code, which deals with the subject of summary convictions before justices of the peace as distinguished from "speedy trials" and "summary trials" of indictable offences, under parts 54 and 55, we find section 864, which provides for the case in which a summary conviction may be made for an assault, which is plainly the summary conviction referred to in section 265. "Whenever any person unlawfully assaults or beats any other person"—that is to say, an assault and battery, unaccompanied with any of those aggravating circumstances which give to it the character of any of the distinct offences recognized by other sections of the Code as something more than a mere assault —"any justice may summarily hear and determine the charge"—that is, the charge simply of an assault and battery —"unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto."

Sub-section (2). If such justice is of opinion that the

assault or battery complained of is, from any other circumstance"—and this very word "other" indicates that the charge as laid must be one which the justice has power to deal with summarily—"a fit subject for prosecution by indictment," as for example, if the evidence discloses a more serious offence than a common assault, or if, even though no more than a common assault, the only penalty which he could impose summarily would under the circumstances be inadequate, "he shall abstain from any adjudication thereupon and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same."

Sections 865 and 866 also show that the charge which the justice is investigating must be one which, as disclosed by the information or complaint, he has, in the absence of objection, jurisdiction to try upon the merits and dispose of summarily. That indeed is the whole scope of this part of the Code.

It is most important in cases of this kind to insist upon the principle that the right of the justices to adjudicate is confined within the limits of the information, because a police or stipendiary magistrate has power to convict summarily under this part of the Code as well as to try summarily certain other classes of assault of a more serious nature under sections 783 and 785, part 55, of the Code, where the effect of a conviction or of the dismissal of the charge differs from that under part 58 and merely frees the offender from all other *criminal* proceeding for the same cause.

It is to be observed that in cases of assaults upon women and children when the charge, *i.e.*, a charge of common assault, is laid before a police magistrate or other magistrate as defined in section 782, the magistrate, instead of acting under section 864 (2), by abstaining from adjudication and committing for trial when he thinks the offence as proved would not be sufficiently punished by a summary conviction under part 58, may try the case summarily, not under that part but under the provisions of part 53, which enable him to impose a more severe punishment.

It is true that where the *charge* is for an unlawful assault

and battery, *i.e.*, assault and battery simpliciter or common assault, the justices may convict and their conviction may be good and a bar to further civil and criminal proceedings even although the evidence discloses a more serious offence such as malicious wounding, or wounding and causing grevious or actual bodily harm, and although it may be that they should have obeyed the directions of section 864 (2) and abstained from convicting: *Regina* v. *Stanton* (1851), 5 Cox C. C. 324; *Regina* v. *Elrington* (1861), 1 B. & S. 688; *Regina* v. *Inhabitants of Denton* (1864), 5 B. & S. 821; *Ex p. Thompson* (1860), 6 Jur. N.S. 1247; *The Queen* v. *Miles* (1890), 24 Q.B.D. 423, 432, 433, 434. But this is because the information is for an offence for which they have power to convict summarily and they have not thought fit, it must be assumed for sufficient reasons, to take the course prescribed by section 864 (2). That, however, is a very different thing from convicting summarily under part 58 where the only information before them is for an offence which they have no jurisdiction so to dispose of.

As Hawkins, J., observes in *The Queen* v. *Miles*, referring to such miscarriages of justice as I have adverted to, they are not likely to happen by reason of any default of the justices if they pursue the simple course of steadily bearing in mind the charge before them. "If that charge be one of felony, or misdemeanor punishable by indictment only, they have no jurisdiction to adjudicate; they can but commit for trial or refuse so to do." See also *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614; Stone's Justices' Manual, 29th ed., 1897, pp, 132, 690.

That, I may also say, is the limit of their jurisdiction where the charge though of assault simpliciter has not been laid by or on behalf of the party aggrieved.

In the case at bar the charge which the justices were proceeding to investigate was a charge of felonious assault. The party aggrieved was not called upon to do anything but to give his evidence. He could not object to the justices proceeding to hear it in the ordinary course of their duty. It may be assumed for the purpose of the case that the infor-

mation had been laid by him or on his behalf. But whether that was so or not, it was one the disposition of which could not affect his civil rights in respect of the assault because the justices had no power to make a summary conviction upon it, or of their own motion so to mould it as to confer upon themselves jurisdiction to do so.

Probably as all parties were before the magistrates they might have agreed, if the latter were of opinion that the charge in the information was not borne out by the evidence, that such charge should be abandoned and the case tried summarily as for a mere assault without laying a fresh information. The complaint would then be made by the party aggrieved. But this is very far from what appears to have been done. I refer to *Turner* v. *Postmaster General* (1864), 5 B. & S. 756; *Peek* v. *De Rutzen* (1882), 46 J. P. 313; *Eggington* v. *Pearl* (1875), 33 L.T.N.S. 428; *Johnson* v. *Colam* (1875), 23 W. R. 697.

It is only necessary to add that the case of *Reed* v. *Nutt* (1890), 24 Q.B.D. 669, shows that the circumstances under which the certificate of conviction was given may now be enquired into and its futility proved although the conviction has not been quashed.

LISTER, J.A.—

The case turns upon whether the defendant is released from liability in this action under section 866 of "The Criminal Code, 1892."

A peace officer laid an information before a justice of the peace charging the defendant with having "unlawfully shot and wounded the plaintiff with intent to do him grievous bodily harm."

The charge as laid was investigated by two justices of the peace. The plaintiff was subpœnaed as a witness by the prosecutor on the charge as laid, attended the investigation, and gave his evidence. The officer before preferring the charge went to the plaintiff and obtained from him the particulars of the alleged shooting. The justices upon the charge

as laid convicted the defendant of a common assault, and imposed a fine and costs, which the defendant paid and now claims that the conviction operates as a release of all liability in this action under section 866 of the Code which enacts as follows:

"If the person against whom any such complaint" (complaint for assault or battery mentioned in section 865) "has been preferred, by or on behalf of the person aggrieved, obtains such certificate" (the certificate of dismissal provided for in section 865), "or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from further or other proceedings, civil or criminal, for the same cause."

The defendant alleges in his statement of defence that an information was laid on behalf of the plaintiff charging the defendant with unlawfully shooting and wounding the plaintiff with intent to do him grievous bodily harm and which charge was reduced by the justices to one of common assault, and he claims the benefit of sections 265, 864 and 866 of the Code. Section 865 provides for giving a certificate of dismissal. Section 866 is the section material to this action and it provides that in case of conviction the person accused (subject to the conditions precedent therein expressed) shall be released from further or other proceedings civil or criminal for the same cause. From the language of section 866 it appears clear that the release thereby provided for can become operative only upon the antecedent conditions prescribed by the statute being strictly complied with.

These conditions are: (*a*) a complaint being preferred for assault or battery by or on behalf of the person aggrieved; (*b*) a conviction on this complaint; (*c*) payment of the fine, etc., imposed, or; (*d*) suffering the imprisonment awarded.

The obvious reason for imposing the first condition is that the person aggrieved shall not without his own consent be deprived of his civil remedy: *Nicholson* v. *Booth* (1888), 16 Cox C. C. 373.

For the purposes of this action I do not think it necessary

to consider whether that portion of section 866 which provides for the release of the civil action for damages is *intra vires* the Parliament of Canada, nor whether the justices had jurisdiction to convict of a common assault when the charge laid was wounding with intent, an indictable offence over which the jurisdiction of the justices is limited to committing for trial if in their opinion the evidence is sufficient to put the accused on his trial.

That no complaint was preferred by the plaintiff or by any other person on his behalf for assault or battery is undisputed.

The charge laid by the officer was for wounding with intent, and without considering whether a conviction for common assault could be made on this charge, it appears to me it was not laid by the officer on behalf of the plaintiff (the person aggrieved), but it was laid by the officer in the discharge of what he considered his duty as such officer without regard to the plaintiff; he was acting on his own behalf as an officer and not on behalf of the plaintiff. Such being the case I am of opinion that the statute does not and could not operate as a bar to the plaintiff's action: *Nicholson* v. *Booth* (1888), 16 Cox C. C. 373.

It was argued at bar that the plaintiff by his presence at the investigation by the justices acquiesced in what was done, and cannot now be heard to object. I cannot accept this view; he was present as a witness, subpœnaed as such to give evidence on the charge laid by the officer, viz., wounding with intent. Upon the evidence I conclude he was present as a witness on the charge as laid and not as prosecutor: *May* v. *Reid* (1889), 16 Ont. App. 150. There is no evidence to show that the justices amended the information (assuming they had jurisdiction to do so), nor when they decided to convict the defendant of a common assault; it may be, for all that appears, that they so decided after the parties had left the court.

I think that the appeal should be allowed.

MACLENNAN, and MOSS, JJ.A., concurred.

Appeal allowed.

Note: *Assault—Civil action—Conviction as bar.*

See *Clermont* v. *Legace* (Que.), *ante* p. 1 and Note to same; also *Nevills* v. *Ballard* (Ont.), 1 Can. C.C. 434, and *Hardigan* v. *Graham* (Que.), 1 Can. C.C. 437.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

NORTHERN ALBERTA JUDICIAL DISTRICT.

BEFORE ROULEAU, J.

THE QUEEN v. HOLLINGSWORTH.

Theft—Goods under seizure—Taking away without authority—Hotelkeeper—Lien for board and lodging—Necessity for tender — 'Lawful seizure and detention' — Recent possession as evidence of stealing—Cr. Code 306.

1. An hotelkeeper who locks up the room of a guest containing the latter's baggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's baggage, &c., under 'lawful seizure and detention,' in respect of the landlord's common law lien; and the taking away of such baggage by the guest without the landlord's authority is 'theft' under sec. 306 of the Criminal Code.
2. The landlord does not by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects; and the owner who removes any baggage as to which the permission does not extend, is guilty of 'stealing' the same under sec. 306 of the Criminal Code.
3. The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due nor invalidate the lien.

DECIDED: March 2, 1899.

Stated case under section 900 of the Criminal Code referred by W. Roland Winter, Esquire, Police Magistrate at Calgary, at the request of the defendant for the purpose of obtaining the opinion of a Judge of the Supreme Court of the Territories, on a question of law arising upon a prosecution

of the defendant before such magistrate, such question being whether the conviction hereinafter referred to is valid or otherwise.

The information was laid by James E. Reilly, proprietor of a hotel at Calgary, against Frank Hollingsworth, charging under section 306 of the Criminal Code, that the latter did on the 10th day of January, 1899, at Calgary, steal and unlawfully carry away two valises and certain wearing apparel, then under lawful seizure and detention by the complainant at his hotel.

The magistrate found that the value of the effects in question did not exceed $10, and the accused also consented to be tried summarily.

On the trial before the Magistrate, the defendant was convicted and sentenced to one month's imprisonment with hard labour.

The evidence for the prosecution shewed that the accused and one Anderson had been guests at the complainant's hotel occupying a room together, and were indebted to the complainant in a balance of about $30 for board and lodging, in addition to which the complainant claimed payment for other items making in all $48.25. Included in this was a disputed charge for $10 for damage done to a carpet, and some charges for liquors supplied and money lent, but the complainant had after the seizure offered to abandon the $10 claim if the balance were paid to him. The hotel bill had been presented to the accused prior to the seizure, but on the same day, and the seizure was effected by the landlord locking the room which the accused and Anderson had occupied, and in which was their baggage, consisting of two valises some wearing apparel, pictures and apparatus for making pictures. The accused was then told that he must leave the house and settle his bill by six o'clock of that evening; he then asked permission to take out the pictures which were intended for delivery to his customers, so that he could deliver them to the respective purchasers and so obtain money to pay his account. The complainant assented to this proposed arrangement with the stipulation that he would not wait

longer than until six o'clock of that day. On this arrangement being made the room was opened, and the accused and Anderson both had free ingress and egress therefrom, until they left the hotel the same evening. The complainant took precautions, by locking one of the street doors of the hotel to prevent any goods being removed without his knowledge, but notwithstanding this all of the chattels were removed.

Anderson owned no part of the baggage in question, but assisted the accused in removing the pictures.

He was called as a witness for the prosecution at the trial and swore that he did not himself remove the valises nor see any one else take them; that he and the accused after leaving the complainant's hotel went to another hotel in Calgary, and roomed together, and that the valises in question were then in their room at the latter hotel.

No evidence was given to shew that the accused had been seen removing the valises.

The accused did not himself give evidence, nor call any witnesses at the trial.

Section 306 of the Criminal Code provides as follows :—

Every one commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention.

The grounds stated by the appellant's counsel, on which the conviction was questioned, were as follows :

1. That there was no evidence that the "valises and sundry wearing apparel" upon which the charge was founded were removed from the Royal Hotel by the defendant or with his knowledge or authority.

2. That the evidence shews that the informant abandoned his lien (if any), before the removal of the goods in question.

3. That it appears from the evidence that the goods in question were held by the informant for security for the payment of $48.25, of which the sum of $10.00 was claimed to be due for alleged damage to a carpet, and $3.00 or thereabouts for liquors supplied to the defendant, and one Anderson, by

retail, by the said informant, and it is submitted that the informant was not entitled to any lien whatsoever for the payment of these sums, and that consequently his alleged lien was not lawful, and the property was not "lawfully detained."

The grounds on which the conviction was supported were as follows:

1. The evidence of Anderson proves that the valises, on which the lien was claimed, were at the time of his giving his evidence, in the room then occupied by himself and the appellant at the Atlantic Hotel, where they were rooming together, and that they had not been removed from the Royal Hotel by him (Anderson). There was a legal presumption therefore that they were carried away or "stolen" by the appellant, and this was in no way rebutted by the appellant, as it easily might have been, if the contrary had been the fact. This justifies the finding that they were in fact so carried away or "stolen" by him. (*R.* v. *Partridge*, 7 Car. and P. 551, and *R.* v. *Langmead*, 9 Cox C.C. 464.)

2. It is submitted that there is nothing in the evidence to shew that the respondent ever abandoned his lien, as suggested in the second ground of objection.

3. It is admitted that a lien could not be legally claimed in respect of certain items in the respondent's bill, but this fact does not vitiate his claim, nor did it excuse the appellant from tendering such a sum as he considered would have cleared his just indebtedness (vide judgments of Parke, B., and Alderson, B., in *Scarfe* v. *Morgan*, 4 M. & W. 271, and *Smith* v. *Allen*, 31 L.J.C.P. 303).

4. An innkeeper or hotelkeeper has, at common law, a lien for board and lodging on effects brought to his inn or hotel by his guests. (*Mulliner* v. *Florence*, 47 L.J.Q.B. 700.) The ordinance of the North-West Territories respecting hotel and boarding-house keepers has no bearing on the present case. This ordinance does not abrogate the common law right of an hotelkeeper to exercise his lien on the effects of his guests (except in respect of liquors supplied), but is ancillary to that right, by enabling him after compliance with the

provisions of the ordinance, to give effect to his lien by sale of the property over which the lien is claimed.

CALGARY, N.W.T., March 2, 1899.

ROULEAU, J.—

Upon the same grounds and authorities on which the conviction is supported, I am of opinion that the accused has been legally convicted of the offence charged; and the police magistrate is therefore so advised.

Conviction affirmed.

A. L. Sifton, Crown Prosecutor.
R. B. Bennett and *T. O'Brien*, for the private prosecutor.
P. J. Nolan, for the accused.

Note: *Theft—Property under lawful seizure and detention—Taking without lawful authority—Cr. Code, 306.*

The ordinary and natural meaning of the word "seizure" is a forcible taking possession. *Johnston* v. *Hogg*, 52 L.J.Q.B. 343, 10 Q.B.D. 432.

Evidence — Stealing — Recent possession of goods stolen — Presumption.

The recent possession of stolen goods is recognized by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still, in effect, a mere natural presumption; for, although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. 2 Starkie on Evidence 684; *R.* v. *Smith*, Ryan & Moody N.P. Cases 295.

The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen; therefore where two ends of

woollen cloth in an unfinished state were lost and were found in the possession of the prisoner two months after their being stolen, and were still in an unfinished condition, it was held that their possession by the prisoner was recent enough to raise a presumption against him of having stolen it. *Rex* v. *Partridge* (1836), 7 C. & P. 551. Mr. Justice Patterson said in the same case: "If the articles are such as pass from hand to hand readily, two months would be a long time; it is a question for the jury."

In *Reg.* v. *Langmead* (1864), 9 Cox C.C. 464, it was held by the Court of Criminal Appeal (Pollock, C.B., Martin, B., Byles, Blackburn and Mellor, JJ.,) that it is a presumption of fact and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing or of feloniously receiving has been committed. Blackburn, J., there said: "If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property, the presumption is that he received it."

Pollock, C.B., in the same case said: "All that appears is that the prisoner was found very recently in possession of the stolen sheep. That, *prima facie*, is evidence of stealing rather than of receiving, but in no case can it be said to be exclusively such, unless the party is found so recently in possession of stolen property and under such circumstances as to exclude the probability of receiving—as where a party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from some one else, then it may be evidence either of stealing or of feloniously receiving."

It has been held that the possession of stolen property consisting of an axe, a saw and a mattock three months after

it was lost is not such a recent possession as to put it upon the prisoner to shew how he came by it, unless there be evidence of something more than the mere fact of possession at such a distance of time after the loss. *R.* v. *Adams*, 3 C. & P. 600; 2 Russell on Crimes (1896), 6th ed. 288.

[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. LECLAIR.

Husband and wife—Non-support—Vagrancy—Refusal of wife to live with husband—Cr. Code, 207 (b).

1. In order to constitute a wilful refusal or neglect on the part of a husband to maintain his family, under Cr. Code sec. 207 (*b*), it is necessary that he should be under a legal obligation to do so, and his failure to maintain his wife, who had left him without valid cause and refused to return, is not an offence under that section.

DECIDED: April 15, 1898.

The appellant, Wilfrid Leclair, was charged by his wife, Rosina Forman, before one of the judges of the Sessions of the Peace, on the 27th September, 1897, with having been for the six months then last past a vagrant, inasmuch as being able to work and thereby or by other means to maintain her, he had wilfully refused or neglected to do so.

The information was laid under paragraph (*b*) of Article 207 of the Criminal Code, which is in the following words: "Every one is a loose, idle or disorderly person or vagrant, who, (*b*) Being able to work and thereby or by other means to maintain himself and family, wilfully refuses or neglects to do so."

The case proceeded to trial, and on the 27th October, 1897, the appellant was convicted as a vagrant for having wilfully refused and neglected to maintain his wife and was

adjudged to pay a fine of $10, and in default of payment to be imprisoned for one month.

The appellant appealed against this conviction to the Court of Queen's Bench, on the Crown Side, and, on the 15th April, 1898, the Court heard the evidence adduced and the parties.

The evidence showed that the informant or private prosecutor was dissatisfied with the home and the living provided for her by her husband, that she had left the conjugal habitation without his consent, and that she had refused to return and live with him, although he had been willing and ready to take her back. It was also shown that she had sued her husband for a separation from bed and board, but that her action had been dismissed, and that during its pendency she had been refused an alimentary pension. No ill-treatment or improper accommodation or support were proved. At the hearing of the appeal, the appellant again offered to take back his wife, but she positively refused to return, and stated that she would never consent to live with him.

MONTREAL, April 15, 1898.

WURTELE, J.—

The magistrate convicted the appellant as a loose, idle and disorderly person, or vagrant, on the ground that he wilfully refused and neglected to maintain his wife. The evidence adduced shows that she had left her husband's house and had for several months before the date of her information lived away from him without his consent, and without judicial authority or other valid reason, that he was willing and ready to receive her in his home, and to maintain her according to his means and condition, and had offered to do so, but that she had refused to live with him.

The question is whether under these circumstances he falls under the scope of paragraph (*b*) of the Vagrant Act, whether in fact, his act of refusing or neglecting to maintain his wife under the circumstances of the case constitutes an act of vagrancy.

Under the provisions of Art. 175 of the Quebec Civil Code a wife is obliged to live with her husband, and the husband is obliged to receive her and supply her with all the necessaries of life, according to his means and condition. If a husband should refuse to receive and keep his wife, without lawful reason, he becomes liable to pay her an alimentary pension. The law obliges the husband to receive his wife and to provide her with the necessaries of life, and he cannot liberate himself from the obligation of providing her with aliments by refusing to keep her with him. But when the wife abandons her husband and refuses to return to the conjugal domicile, when in fact she leaves him without his consent, and without judicial authorization or other valid reason, he is under no obligation to maintain her. She has, then, only one way to obtain her living from him, and that is to return to the conjugal home, and it is only when the husband refuses to receive his wife that she can exact a separate maintenance. (3 Laurent, Nos. 54, 55.)

In order to constitute a wilful refusal or neglect on the part of a husband to maintain his wife while living apart from him, it is necessary that he should be under a legal obligation to do so; and in this case the appellant is not under such legal obligation. The informant or private prosecutor left him without his consent, and without any judicial authorization, and no proof has been made that the home and sustenance which he provided for her were improper and incompatible with his means and condition, or that he ill-treated her, and he has been and is ready to take her back. This case, although apparently brought to punish an offence under the criminal law, looks like an attempt in reality to enforce a separate maintenance where the husband is ready to receive his wife and provide her with sustentation in common with himself. It is really an attempt to enforce a civil remedy by a criminal prosecution.

There is in the present case no wilful breach of any lawful obligation on the part of the appellant towards his wife. In neglecting to provide under the circumstances for the separate support of his wife, he did not therefore commit an act of

vagrancy, and cannot be convicted under paragraph (*b*) of Article 207 of the Criminal Code as a vagrant on the ground of having wilfully refused and neglected to maintain his wife.

I follow in this case the decision in *Flannagan* v. *The Overseers of Bishopwearmouth*, (1857), 3 Jurist, N. S. 1103, which is a case entirely in point.

The appeal is maintained and the case is dismissed with costs in both courts.

Appeal maintained.

Edmund Guerin, for the appellant.
George E. Mathieu, for the private prosecutor.
J. P. Cooke, Q.C., crown prosecutor.

Note: *Non-support of wife—Wilful refusal or neglect of husband to maintain—Cr. Code, 207 (b).*

By the English Act 5 George IV. (1824), c. 83, sec. 3, it was enacted that "Every person, being able wholly or in part to maintain himself or herself, or his or her family, by work or other means, and *wilfully refusing or neglecting* so to do, by which refusal or neglect he or she, or any of his or her family *whom he or she may be legally bound to maintain*, shall have become chargeable to any parish, township or place; . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such offender being thereof convicted before him . . . to the house of correction, there to he kept to hard labour for any time not exceeding one calendar month."

By sec. 4 of the same Statute, "Every person running away and leaving his wife, or his or her children, chargeable, or whereby she or they or any of them shall become chargeable, to any parish, township or place . . . shall be deemed a rogue and vagabond within the true intent and meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such offender being thereof convicted before him . . . . to the house of correction, there to be

Note—*Continued.*

kept to hard labour for any time not exceeding three calendar months."

In the *Flannagan* case, cited above, a conviction had been made against him under sec. 3 of the English Statute 5 George IV., c. 83, for wilfully refusing or neglecting to maintain his wife, whereby she had become chargeable to the parish, and a case was stated by the magistrates for review by the Court of Queen's Bench. Lord Campbell, C.J., said: "It appears that the husband had ill-treated his wife, that he promised to make her an allowance, and that he has broken his promise. He asked her to come home and live with him, but she refused to do so. I assume that he had ill-treated her in such a manner that if she had proceeded against him in the ecclesiastical court for a divorce *a mensâ et thoro*, she would have succeeded in obtaining such a divorce, and also that she might have got necessaries to support her. But, on the question whether he is guilty under this Act of Parliament, I am of opinion that he has not committed the offence provided for by it, and that the conviction is improper." Coleridge, J., concurred. Wightman, J., said: "It is clear, under the circumstances stated in the case, that this was an attempt to enforce a separate maintenance for the wife. The husband was willing to keep her if she would come and live with him; but she insists on a right to have a separate allowance. It seems to me that the construction which has been put upon the Act is not correct, and that therefore the conviction must be quashed."

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J., Q.B.
BEFORE ROSE, J.

THE QUEEN v. GIBSON.

Habeas Corpus—'Court of record', meaning of—Trial by police magistrate with consent—Extended powers of General Sessions Court—Commitment—Recital of invalid conviction—Uncertainty in conviction—Cr. Code 185, 785, 800.

1. A police magistrate trying a prisoner with his own consent for an offence triable at a Court of General Sessions, does not constitute a "court of record" within the meaning of the Ontario Habeas Corpus Act.
2. The exception contained in the Habeas Corpus Act, R.S.O. 1897, c. 83, as to convictions or orders of a court of record, Court of Oyer and Terminer or general gaol delivery, or Court of General Sessions of the Peace, only bars the granting of a writ of habeas corpus in respect of a court of record not specifically named in such exception, when such court of record is not inferior to or less principal than the High Court of Justice.
3. Per ROSE, J.—A conviction for "unlawfully procuring *or* attempting to procure" a girl to become a prostitute, is void for duplicity and for uncertainty.
4. Per ROSE, J.—Section 800 of the Criminal Code does not validate a defective commitment, if it recites a conviction which is on its face invalid.

DECIDED: September 12, 1898 and October 6, 1898.

The prisoner was charged before the police magistrate for the city of Hamilton with an offence against sec. 185 of the Criminal Code, which enacts that:

Every one is guilty of an indictable offence, and liable to two years' imprisonment with hard labour, who—

(c) procures, or attempts to procure, any woman or girl to become, either within or without Canada, a common prostitute; or

(d) procures, or attempts to procure, any woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere; or

(f) procures, or attempts to procure, any woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada.

The prisoner elected to be tried summarily by the magistrate, and was so tried by him under the power conferred by sec. 785 of the Criminal Code, which is as follows:

If any person is charged in the Province of Ontario before a police magistrate * * with having committed any offence for which he may be tried at a Court of General Sessions of the Peace * * such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

The prisoner was convicted by the police magistrate and sentenced to imprisonment and fine.

J. Dickson, for the prisoner, applied to ARMOUR, C.J., in Chambers, for an order for the issue of a writ of *habeas corpus* and *certiorari* in aid.

TORONTO, September 12, 1898.

ARMOUR, C.J.—

The prisoner in this case was charged before the police magistrate for the city of Hamilton with an offence triable at the General Sessions of the Peace, and, having elected to be tried summarily, was by him convicted and was by him sentenced to imprisonment and fine; and she now applies for a writ of *habeas corpus* under the provisions of R.S.O. 1897, ch. 83, which Act provides (sec. 1) for the issue of such a writ where a person is confined or restrained of his liberty (except persons imprisoned for debt, or by process in any action, or by the judgment, conviction or order of a Court of Record, Court of Oyer and Terminer or General Gaol Delivery, or Court of General Sessions of the Peace).

It is unnecessary, in the view I take of the proper construction to be placed upon the words of this exception, to

determine the very difficult question whether or no the police court of the city of Hamilton, exercising the power conferred upon it by sec. 785 of the Criminal Code, is a Court of Record.

For I think that the words "a Court of Record" are intended to include only Superior Courts or principal Courts of Record, and not inferior courts or less principal Courts of Record, and do not include any Courts of Record inferior to or less principal than the High Court of Justice.

The authority for this view is to be found in *Gregory's Case* (1596), 6 Co. Rep. 19*b*, following which is *O'Reilly qui tam* v. *Allan* (1854), 11 U.C.R. 526.

Besides, if by the words "a Court of Record" had been intended all Courts of Record, there would have been no necessity for adding to the words a "Court of Record" the words "Court of Oyer and Terminer or General Gaol Delivery, or Court of General Sessions of the Peace," for these were all Courts of Record and would have been included in the words a "Court of Record."

In coming to this conclusion I have not overlooked the cases of *Regina* v. *St. Denis* (1875), 8 Ont. Pr. 16, and *Regina* v. *Goodman* (1883), 2 Ont. R. 468, but, the liberty of the subject being involved, I think that I am bound to express my individual opinion.

I therefore award the *habeas corpus* and a *certiorari* also if the applicant desires it.

I refer also to *Rex.* v. *Steventon* (1802), 2 East 362; 2 Hale's P.C. 29; *Ex p. Fernandes* (1861), 10 C.B.N.S. 3; 31 Central L.J. 86.

The writs having been issued and a return made, *Wallace Nesbitt*, for the prisoner, moved before ROSE, J., in Chambers, on the 16th September, 1898, for an order for her discharge, upon grounds which are stated in the judgment.

J. R. Cartwright, Q.C., for the Crown, showed cause.

TORONTO, October 6, 1898.

ROSE, J.—

This was a motion to discharge the prisoner on return of

a writ of *habeas corpus* and *certiorari* in aid. It was objected that the commitment was void by reason of a defect appearing upon its face, in that the conviction therein recited was not valid, being faulty for duplicity and uncertainty.

The conviction recited was for "unlawfully procuring *or* attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, *or* with intent that she might become an inmate of a brothel elsewhere." I think the conviction thus recited is invalid, for the reason suggested. Procuring of course is quite different from attempting to procure; and the second alternative, "or with intent," etc., adds to the uncertainty. It seems to be impossible to sustain the commitment against such an objection.

But it was urged on behalf of the Crown that under the provisions of sec. 800 of the Criminal Code the commitment was not to be held void by reason of any defect therein, as it was alleged that the offender had been convicted, and there was a good and valid conviction to sustain the commitment. If the conviction in this case is valid, possibly the section of the Code referred to does prevent the objection taken being successful, because the commitment does allege a conviction. However, on turning to the conviction, I find that not only is it not for the offence recited in the commitment, which probably would not be a fatal objection having regard to the words of the section, but also it does not disclose any offence within the section of the statute under which this prosecution was had, which is sec. 185 of the Code. The conviction is that the prisoner, "at Hamilton aforesaid, in the county aforesaid, did unlawfully procure a girl of seventeen years, Ida Dawson, to become, without Canada, an inmate of a brothel kept by the said Maud Gibson at Lockport in the State of New York, one of the United States of America."

The section to which I have referred makes everyone guilty of an indictable offence who, amongst other things, procures or attempts to procure any woman or girl to leave Canada, with intent that she may become an inmate of a brothel elsewhere, or to come to Canada from abroad, with intent that she may become an inmate of a brothel in Canada, or to leave her

usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada. These are the only provisions of such section that could in any manner be invoked to support the conviction ; and it is manifest that no one of them does support it.

Another question has been raised which is not without weight, namely, that there is no evidence to show that the prisoner did unlawfully *procure* a girl to become an inmate of a brothel, because, admitting an intention to do so, it rested merely in an attempt, as the parties were all arrested in Canada before crossing the river. But I need not express any opinion upon this objection.

I think, therefore, that the commitment must be held void as reciting a conviction which on the face of it is invalid ; and that I cannot support the commitment under the provisions of sec. 800, because upon looking at the conviction which has been returned to the Court, I find that it is not a good and valid conviction.

I have not considered the objection taken by the Crown that the writ of *habeas corpus* should not have been granted where the conviction is one under the provisions of the statute for summary trial of indictable offences. This objection has been dealt with in a considered judgment by the learned Chief Justice who made the order for the writ, and I think it best to follow his judgment without expressing any opinion of my own, leaving the Crown, if it be so advised, to raise the question in any manner that may be open to obtain the opinion of an appellate tribunal.

The order must go for the discharge of the prisoner.

Prisoner discharged.

Note: *Habeas corpus—Conviction by a 'court of record'—Superior or inferior court.*

In *The Queen* v. *Murray* (1897), 1 Can. C.C. 452, 455, it was held by the Ontario Court of Appeal that habeas corpus did not lie for the purpose of reviewing a conviction of a

Note—*Continued.*

"County Court Judge's Criminal Court" having general jurisdiction over the offence charged, as such Court is a *court of record.* The Habeas Corpus Act (Province of Canada), 1866, 45 Vict., c. 45, applied only to Upper Canada and excepted from its provisions "persons imprisoned for debt, or by process in any civil suit, or by the judgment, conviction or decree of any court of record, Court of Oyer and Terminer or General Gaol delivery, or Recorder's Court not being a Court wherein the Recorder shall sit alone without a jury."

That statute would appear to be still in force as regards matters of criminal law in Ontario, without regard to any amendments since introduced in the revisions of the Ontario Statute Law. The revised Act—R.S.O., 1897, c. 83—would, of course, control as regards convictions, etc., under the quasi-criminal law of the province, falling under the legislative powers of the Provincial Legislature.

The judgment of a *superior court* of record having general jurisdiction over the offence is *res judicata* as to questions of jurisdiction, as well as to all other objections. *Re Sproule* (1886), 12 Can. S.C.R. 140, 205. In such case, an objection that the Court ought not to have exercised its jurisdiction, or that there was some fatal defect in its proceedings, is one for a court of error. *Re Sproule*, 12 Can. S.C.R., at page 205; *Re D. C. Ferguson* (1892), 24 N.S.R. 106.

Apart from statutory provisions, the rule in cases of felony is that after a conviction by a Court having general jurisdiction of the offence charged, a case cannot be reviewed upon habeas corpus, but must be brought up by writ of error or by an appeal. *Re Sproule*, 12 Can. S.C.R. 140; *Brenan's Case*, 10 Q.B. 502; *Re D. C. Ferguson* (1892), 24 N.S.R. 106. Before the passing of the Ontario Habeas Corpus Act, the origin of which is chapter 45 of the Statutes of the Province of Canada of 1866 (29-30 Vict.), it was held that a writ of habeas corpus would not be granted to bring up a prisoner under sentence of conviction at the Quarter Sessions for larceny. *Regina* v. *Crabbe* (1854), 17 U.C.Q.B.

Note—*Continued.*

447. The decision of Robinson, C.J., in that case is quoted with approval by Ritchie, C.J., in *Re Sproule*, 12 Can. S.C.R., at page 200, and by Strong, J., at page 211.

It has been held in Nova Scotia by Townshend, J., that a judge of the County Judge's Criminal Court is invested as to proceedings within the jurisdiction of that Court, with the like powers as belong to a Superior Court judge, and that the decision or sentence of the County Judge can only be reviewed in the way fixed by the Criminal Code, and not by means of a writ of habeas corpus. *The Queen* v. *Burke* (1898), 1 Can. C.C. 539.

"Superior courts may have jurisdiction by implication, though they are not named; but no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute by implication; they must be expressly mentioned in the statutes themselves, and cognizance be given to them in express terms." *O'Reilly qui tam* v. *Allan* (1854), 11 U.C.Q.B. 526, 529; *Gregory's Case*, 6 Co. 19. It was, therefore, held that the words "any court of record in Canada West" did not give jurisdiction in penal actions to the County Courts. *O'Reilly* v. *Allan*, supra.

It would appear that whether or not a court of record, with criminal jurisdiction, is a *superior* or an *inferior* Court, a habeas corpus is not the proper method whereby to obtain a review of its proceedings (if the offence is one which would formerly have been a felony), so long as it has general jurisdiction of the case, except in Provinces where the provisions of the Imp. Act 31 Car II., c. 2, have been extended so as to abrogate the strictness of the rule. *R.* v. *Lees*, 27 L.J.N.S. 407; *Ex parte Fernandez*, 10 C.B.N.S. 37; *Ex parte Partington*, 6 Q.B. 656; *Regina* v. *Newton*, 3 W.R. 419; *Fleming* v. *Clarke*, 11 Allen (Mass.) 195.

"If, however, a Court having no jurisdiction over the offence charged should so far exceed its authority as to entertain a criminal prosecution, there the proceeding being one beyond its general jurisdiction is wholly void, and the prisoner so illegally dealt with may be entitled to be dis-

Note—*Continued.*

charged on a writ of habeas corpus." Per Strong, J., in *Re Sproule*, 12 Can. S.C.R., at page 205.

The Ontario Act enlarges the scope of the writ of habeas corpus, and in that Province it is necessary to determine whether or not the Court making the conviction is such a 'court of record' as the statute contemplates. The interpretation placed upon it by Armour, C.J., in *The Queen* v. *Gibson*, reported above, appears to conflict not only with the *St. Denis* and *Goodman* cases therein referred to, but with the decision of the Court of Appeal in *The Queen* v. *Murray* (1897), 1 Can. C.C. 452.

[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE OUIMET, J.

THE QUEEN v. GILLESPIE. (No. 2.).

Trading company—False statement of affairs by director—Locality of crime—Place of mailing or place of receipt of post letter—Continuing offence—Completion in another Province—Jurisdiction—Cr. Code 365, 553 (b), 554 (b).

1. Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed.
2. In such case, the Courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district.

MONTREAL, September, 1898.

OUIMET, J.—

The prisoner is described in the indictment as the president and manager of the "W. E. Gillespie Co., Limited, a trading company, incorporated by letters patent, doing

business at Penetanguishene and other places in Ontario." He is charged, under art. 365 of the Criminal Code, with having, at Montreal, made, circulated and published certain false statements of the financial position of the company, with intent to defraud its creditors in general, and in particular the firm of Thibaudeau Bros., wholesale dry goods merchants of Montreal.

The evidence adduced by the Crown shows that the above trading company had, from its inception in 1895, opened a large account with the firm of Thibaudeau Bros. Some time in July, 1897, this account being found unsatisfactory, the company was asked by letter from Montreal to send in a statement of its financial position. In answer to that request, a statement was prepared by the accused, acting as president and manager of the company, showing that the assets, amounting in all to about $25,000, exceeded the liabilities by about $10,000. The account of the company with Thibaudeau Bros., was over $7,000.

This statement was enclosed in a letter addressed and mailed at Penetanguishene to Thibaudeau Bros. at Montreal, where it was received by the latter, and the result was that Thibaudeau Bros., believing that the statement was a true statement, renewed the paper of the company and advanced them new goods.

A second statement similar to the first one was, in April, 1898, asked and sent in the same way. This is alleged in a second count of the indictment.

The Crown has now closed its case, and the learned counsel for the defence moves that the jury be discharged on the ground that the evidence shows that the offence, if any has been committed, was begun and consummated at Penetanguishene, Ontario, and therefore this Court has no jurisdiction.

It is contended that when the statement was posted at Penetanguishene, the offence charged was fully completed by the defendant, the letter enclosing the statement having become the property of Thibaudeau Bros. from the time of its delivery at the Post Office in Penetanguishene. In support

of that contention, the defendant cites the Post Office Act, R. S. C., ch. 35, s. 43, and also the case of *Regina* v. *Jones*, 1 Den. 558.

This same question has already been decided (1 Can. C.C. 551) by Mr. Justice Wurtele on a petition for Habeas Corpus, asking for the same reasons that the *committimus* issued by the magistrate be quashed. The learned justice dismissed the petition, and I fully agree with his decision.

The essential ingredients of this offence are: (1) the falsity of the statement made by an officer of an incorporated company; (2) the circulating or publication of such statement so that it may reach the parties or party intended to be defrauded. In the present case the parties intended to be defrauded resided in Montreal, and it is here they were intended to be reached by the accused and the intended fraud was to be achieved and did in effect take place.

The defendant has of his free will accepted the jurisdiction of this Court by doing an act the intended result of which was to take place here. In the same way A, standing within the limits of a judicial district and shooting across the boundary of the district at B standing on the other side of it, within another judicial district, with intent to kill him, would bring himself within the jurisdiction of the courts of the latter district. In the same way C writing, from Montreal, a threatening letter to E, a citizen of Toronto, to whom the letter is sent by mail, could be tried either at Toronto or Montreal. The following decisions cited by the learned counsel for the Crown are in point: *Regina* v. *Girdwood*, 2 East P. C., p. 1120; *Regina* v. *Esser*, 2 East P. C., p. 1125; *Regina* v. *Burdett*, 4 B. & Ald. 95. In these cases, it was held that the accused was rightly committed and tried in the judicial districts where the letters had been addressed and delivered to the parties threatened, although written and posted in another district,

The *Jones* case, cited by the defence, is not in contradiction with these decisions. In the *Jones* case is was held that the prisoner had been rightly convicted in the jurisdiction within which the money had been obtained and mailed, in answer to

a demand made by letter from the accused who resided and received the money in another jurisdiction.

The application of the prisoner to discharge the jury and dismiss the case for want of jurisdiction of this tribunal is rejected, and the accused must proceed with his defence.

Application refused.

Cooke, Q. C., for the Crown.
Greenshields, Q. C., for the accused.

Note: *Locality of crime—Offence continued and completed in another province or district—Cr. Code 553 (b).*

Sec. 365 of the Criminal Code, under which the defendant was charged, provides as follows :—

365. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons (whether ascertained or not) to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them (whether ascertained or not), of such body corporate or public company, or with intent to induce any person to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof. R.S.C., c. 164, s. 69.

Sec. 553 provides that for the purposes of the Code the following provision shall have effect with respect to the jurisdiction of justices :—

553 (*b*). Where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions.

Note—*Continued.*

This last section is derived from the Imperial Act, 7 Geo. IV., c. 64, s. 12.

In *Rex* v. *Girdwood* (1776), 2 East P.C. 1120, 1 Leach's Crown Cases 169, it was held on a case reserved, that a person writing a threatening letter in one county and delivering it to another person in that county, by whom it was posted at the writer's request to an address in another county, was properly tried and convicted in the latter county.

In *Esser's Case*, 2 East P.C. 1125, Lord Mansfield held that the sending of a letter by post directed to a person in another county was a sending also in the latter county, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county. 3 Russell on Crimes, 6th ed., 722 (*p*).

If the accused person, "wherever he may be," (*i.e.*, within Canada,) is charged with having committed an indictable offence within the limits over which a justice of the peace has jurisdiction, the justice is empowered to issue a warrant or summons to compel the attendance of the accused person before him for the purpose of preliminary enquiry; Cr. Code, s. 554 (*b*); and the accused may be arrested upon such warrant in any part of Canada upon the warrant being "endorsed" by a justice within whose jurisdiction the accused may be found; Cr. Code 565 and Code form H. The "endorsement" is to be made only upon proof, by oath or affirmation, of the handwriting of the justice who issued the same, and when made is sufficient authority to the person bringing such warrant, to carry the person against whom the warrant is issued, when apprehended, before the justice who issued the warrant or before other justices at the place from which the warrant came. Cr. Code 565.

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE DUBUC, KILLAM AND BAIN, JJ.

THE QUEEN v. PIKE.

Forcible entry—Intent—Interference with possession—Seisure of goods—Trespass—Cr. Code 89.

1. To constitute a 'forcible entry' on land under the Criminal Code sec. 89, the act of going upon the land must be done with the intention of taking possession of the land itself.
2. An entry upon land for the purpose of seizing and taking away chattels thereon is not a 'forcible entry' under sec. 89 of the Criminal Code, although made contrary to the will of the occupant and in a manner likely to cause a breach of the peace.
3. Such an entry is a mere trespass.

ARGUED: December 6, 1898.

DECIDED: December 23, 1898.

The prisoner was indicted on a charge of having unlawfully and injuriously and with a strong hand entered into a house and land then in the possession of one Phillips, in a manner likely to cause a breach of the peace.

Section 89 of the Criminal Code, 1892, is as follows:—

89. Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceable possession of another.

(2.) Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.

(3.) What amounts to actual possession or colour of right is a question of law.

(4.) Every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment.

The prisoner having elected to take a speedy trial was tried before Killam, J., at a sitting of the County Court Judge's Criminal Court at Winnipeg.

The judge's findings as to the facts were as follows: That one Phillips was, on the 13th day of July, 1898, the tenant of and in actual peaceable occupation of a dwelling-house and the parcel of land on which said house was situated, in the City of Winnipeg; that, upon that day, while she was such tenant and so in occupation, the accused opened a door of said house, which was then unlocked, and went in contrary to the will of Phillips and in a manner likely to cause a breach of the peace, the accused being then accompanied by four other men, acting under his directions who went into the house and premises with him; that there were then in the house in the possession of Phillips various articles of furniture and other chattels, which articles the accused *bona fide* claimed and believed to be his absolute property and to the possession of which he *bona fide* believed himself entitled; that he and the men so accompanying him went into the house solely with the intent and purpose of taking possession of and removing the said articles from the premises, and not with intent to take possession of the house or land or any part thereof, or of ousting Phillips therefrom, or of interfering with the possession or occupation of the house and land or of any part thereof by Phillips, save in so far as was necessary to the removal of the articles; and neither the accused nor any of the men accompanying him took or attempted to take possession of the house or land or any part thereof; nor did they or any of them oust or attempt to oust Phillips from the possession of the house or land or any part thereof; nor did they nor any of them interfere with the possession or occupation of the house and land by Phillips, save by the taking possession of and the removal of the articles and by such acts as were actually necessary to such taking possession and removal.

KILLAM, J.—

After referring to the evidence, delivered the following judgment) :—

"The question then is whether this was an entry within section 89 of The Criminal Code defining Forcible Entry. No authority has been adduced to show that a mere trespass for the purpose of taking away goods is such an entry. All the authorities cited, with reference to the offence of forcible entry before our Criminal Code, seem to treat it as applicable only to cases where parties enter to take possession of the land and deprive the party in possession, of the possession of the same. The language of Hawkins, P.C., Bk. 1, c. 64 (p. 36), is not against this, as the learned writer is dealing there, only with the nature of the violence required to make the entry forcible, and puts the taking away of chattels as one instance of violence. His previous discussion supports the view that I take of the nature of the entry itself which, if with sufficient force, constituted an offence.

Our Code, defines forcible entry, as where a person "enters" on land in the actual and peaceable possession of another, etc. I think, in view of what I take, in the absence of authority to the contrary, to have been the previous law, that "entering" in the Code is not merely going upon land or trespassing upon it, but there must accompany the act of going upon the land some intent to take possession of the land itself and deprive the possessor of the land, and that such an interference with the possession as trespassing upon it for the purpose of taking away chattels upon the land is not an "entering" within the Code.

If any authority were shown tending at all to support the view that such an entry as was here made was an offence under the former law, I would convict and reserve the point, but, as no such authority is adduced and as, upon my previous understanding of the law, it was not, I acquit the accused; but if it is desired I will reserve the question for the consideration of the Full Court.

In the meantime I enter a verdict of Not Guilty, and discharge the accused."

Subsequently, on the request of the private prosecutor, Killam, J., stated a case setting out the above facts and reserved for the opinion of the Full Court the following question: Upon the facts set out was there any evidence warranting the conviction of said J. W. Pike upon the charge on which he was tried?

WINNIPEG, December 6, 1898.

R. L. Ashbaugh for the private prosecutor: The question is, What is forcible entry? Crankshaw's Crim. Code, 829. The object of the accused was unimportant. It is the act which constitutes the offence. In nearly all cases of forcible entry there have been several participants, some of whom might have no intention of taking possession. Yet all may be convicted of forcible entry. What the law aims at is to punish a breach of the peace. Hawkins P.C., vol. 2, pp. 36, 38, 42, 43.

No one appeared for the accused.

WINNIPEG, December 23, 1898.

DUBUC, J.—

The question is whether the offence of forcible entry as defined by section 89 of The Criminal Code is meant to apply only to an entry made with the intent of interfering with the actual occupation of land by a person in peaceable possession thereof, or whether it is intended to cover an entry upon land for the purpose of taking furniture or other chattels, or for any other purpose having no connection whatever with the possession or occupation of the land.

The first sub-section of section 89 speaks of forcible entry on land in rather general terms, it is true; but the other three sub-sections leave no doubt whatever as to the meaning. They show clearly that the offence or offences intended are acts of interference with the possession or occupation of land.

Russell on Crimes, vol. 1, p. 427, (4th ed.) says: "If a person who pretends a title to lands merely go over them,

either with or without a great number of attendants, armed or unarmed on his way to the church, or the market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry within the meaning of the statutes; otherwise, if he make an actual claim with any circumstances of force or terror. Drawing a latch and entering a house seems not a forcible entry according to the better opinion; so, if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries." . . . "Threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry."

The same doctrine, taken from older authorities, is also found in Roscoe's Criminal Evidence, (7th ed.) p. 491, and in Archbold's Criminal Pleading and Evidence, (17th ed.) p. 849.

Lord Tenterden, C.J., expressed himself as follows, in *Rex* v. *Smyth*, 5 C. & P. 201: "An indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least of such kind of force as is calculated to prevent any resistance."

The above shows what is meant by forcible entry in England; and it does not appear that section 89 of our Criminal Code is intended to make the offence cover a wider ground.

There is no doubt that Pike committed a trespass in entering the house of the complainant; but as it is clear that he did not interfere, nor did he in any way attempt or intend to interfere with her possession of the premises, he cannot be convicted of the offence of forcible entry, as defined by section 89.

I am, therefore, of opinion that the question submitted to the Court should be answered in the negative.

KILLAM, J.—

I remain of the same opinion as at the trial and have nothing to add to what I said then.

BAIN, J.—

Upon the facts stated in the case reserved, I think there was no evidence that would have warranted the conviction of the accused.

He was indicted under section 89 of The Criminal Code; and it was urged that the intent with which the entry was made is immaterial under this section, as long as it was made, as the learned judge states that it was here, in a manner likely to cause a breach of the peace.

Forcible entry and forcible detainer, which the section purports to define, were offences well known to the laws long before the Code was passed; and I do not think Parliament intended by this section either to create new offences or to make any change in the law relating to the offences named therein.

In Stephens' Digest of Criminal Law, p. 55, it is said that everyone commits the misdemeanour called forcible entry who, in order to take possession thereof, enters upon lands or tenements in a violent manner. In Russell on Crimes, (5th ed.) vol. 1, p. 404, a forcible entry is said to be committed by violently taking possession of lands and tenements with menaces, force and arms, without the authority of law. And in Hawkins P.C., c. 64, s. 2, it is explained why it became necessary to make forcible entry and detainer criminal offences.

From these and many other authorities that might be cited it is clear that the intention to take possession of the lands and tenements entered upon is an essential element in a forcible entry; and the evidence in the present case shows that it was not with any such intention that the accused made the entry he is charged with. He does not seem to have done anything for which he could be held to be criminally responsible, and he was properly acquitted.

Discharge of prisoner affirmed.

[COURT OF QUEEN'S BENCH, QUEBEC.]
CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. YANCEY.

Mixed jury—Right in Quebec to have one-half of jury chosen from persons skilled in the 'language of the defence'—Interpretation—Privilege dependent upon personal characteristic—Election by counsel to defend in French an English-speaking prisoner—Cr. Code 664, 670.

1. The right to a mixed jury in the Province of Quebec, conferred by 27-28 Vict., c. 41, Statutes of the Province of Canada, still exists in criminal cases, notwithstanding the statute 46 Vict., c. 16 (Que.) purporting to repeal the former Act.
2. A statute of the former Province of Canada in force at the time of Confederation, which conferred the right to a mixed jury in Lower Canada, now the Province of Quebec, remains in force thereafter as a matter of 'criminal procedure' as to that province, and can be varied or repealed only by the Parliament of Canada. B.N.A. Act, sec. 91 (27).
3. The prosecuted party may, upon arraignment, demand a jury composed for the one-half at least of persons skilled in 'the language of his defence,' whether French or English; but this does not give the accused an option to choose either language as the language of the defence, nor to have at least one-half of the jurors drawn from those skilled in the language in which counsel for the accused proposes to conduct the defence.
4. The 'language of the defence' in that connection means the language habitually spoken by the accused.

MONTREAL, March 10, 1899.

WURTELE, J.—

Upon the arraignment of Anna Yancey, on an indictment charging her with shooting with intent to commit murder, her counsel declared that the language of the defence was French, and moved that she should be tried by a jury composed, for one-half at least, of persons skilled in that language. The Crown Prosecutor stated that the prisoner's language was not French, but English, and he consequently

objected to the motion asking for six jurors skilled in the French language. I thereupon asked the prisoner what language was spoken in her family and was habitually used by her, and she replied that it was the English language.

Any prosecuted party whose language is either English or French has the right to obtain a *medietate linguæ* or mixed jury; that is, a jury composed for one-half at least of persons skilled in the language of the defence. The Criminal Code provides for mixed juries in Manitoba, but does not specifically establish the same right in the Province of Quebec. The only allusions contained in the Code with reference to mixed juries in the Province of Quebec are contained in Articles 664 and 670. The first declares that in the districts in which the sheriff is required by law to return a panel of petit jurors composed for one-half of persons speaking the English language, and for the other half of persons speaking the French language, he shall specify separately the jurors speaking each of these languages, and it enacts that the names of the jurors so summoned shall be called alternately from the list. Article 670 enacts that when an accused person, who is entitled to twenty or to twelve peremptory challenges, has elected to be tried by a mixed jury, his challenges shall be divided equally between the English-speaking and the French-speaking jurors. Both these articles assumed that the right to a mixed jury existed in the Province of Quebec. This right to have a mixed jury in the Province of Quebec is given by sub-section 2 of sec. 7 of the Statute of the Province of Canada, 27-28 Vict., ch. 41, which enacts that: "If any prosecuted party, upon being arraigned, demands a jury composed for the one-half at least of persons skilled in the language of his defence, if such language be English or French, he shall be tried by a jury composed for the one-half at least of the persons . . . who upon the panel . . . are found in the judgment of the Court to be skilled in the language of the defence."

This statute was one which related to jurors and juries, and it was repealed by the Legislature of Quebec in 1883 by the Statute 46 Vict., ch. 16. All that part of the statute

thus repealed, which treated of the qualification of jurors and of the formation of juries, related to the organization of criminal courts, and, therefore, falls under the exclusive authority and jurisdiction of the Provincial Legislature; but the enactment contained in it, which gave the right to accused persons whose language was either English or French to have a mixed jury, was a matter of criminal procedure, and falls under the exclusive authority and jurisdiction of the Parliament of Canada, and was therefore beyond the power of the Provincial Legislature to repeal. This particular enactment could not be abrogated by the Provincial Legislature, and was not affected in any way by the repeal of the Act, and it is, therefore, still in force.

In the present case, the counsel for the prisoner contends that any prosecuted party has the right to declare which of the two languages is the language of the defence, and that the words "the language of the defence" must be taken to mean the language in which he will be defended by his counsel. On the other hand, the crown prosecutor maintains that the words "the language of the defence" mean the language of the prosecuted party. What is before the Court is the interpretation of the words, "the language of the defence," whether they mean the language of the prosecuted party or the language of the counsel charged with his defence, or in which he intends to defend the prisoner.

The privilege of obtaining a mixed jury is a personal one, which belongs of right to any prosecuted party whose language is either English or French, and it is granted in order that there may be in the jury which is empanelled to try him six jurymen at least whose thoughts are communicated, and whose opinions are formed in the language spoken by the accused person. The right or privilege is granted for the sake of the accused person, and not for the convenience of his counsel. Formerly, in England and in this country, a foreigner or alien had the privilege of obtaining a jury composed for one-half of *aliens* and for the other half of *denisens*. This privilege was essentially a personal one, and was granted only to a person who was alien born. The

privilege by which an accused person in the Province of Quebec can claim a mixed jury is of a similar personal nature, and as the alien born could claim for a personal reason six foreigners upon the jury, so the prosecuted party can likewise claim for a personal reason six jurors speaking his language. There exists in England another privilege of the same character. When an indictment is found against a scholar of the University of Oxford, the accused scholar has the right to be tried in the Court of the Lord High Steward of the University by a jury formed *de medietate* half of freeholders and half of matriculated laymen, when such right is claimed in due time and manner. This privilege also rests on a characteristic personal to the prosecuted party. Like in the case of the alien, where the privilege existed on account of a personal characteristic, and in the case of the scholar, where it exists for the same reason, so in the Province of Quebec the right to a mixed jury depends upon a characteristic of the accused person, and that is the fact that the language which he habitually speaks is either English or French. The privilege of having six jurors of the one or of the other language cannot be exercised as a matter of choice, but the manner in which it is to be exercised depends on a matter of fact, and that fact is the language of the prosecuted party. The privilege does not depend upon the language of the prosecuted party's counsel, but is altogether personal to the prosecuted party himself; and the manner of its exercise—that is, whether there should be six jurors speaking the English language or six jurors speaking the French language—depends upon a fact, and not upon the option of the prosecuted party.

I have been unable to find in the law reports any cases in which this question has been decided. I found, however, a case in which the matter is incidentally referred to. It is in the case of *Regina* v. *Chamillard* (reported in Vol. 18 of the Lower Canada Jurist, at page 149), in which the verdict was vacated and set aside because it was discovered that one of the six jurors who were sworn as being skilled in the French language, which was that of the prisoner, was not so

skilled. In the judgment of the Court of Appeal, we find the statement that half of the jury should have been composed of persons skilled in the French language, being the language of the accused, and that Adam Devine was not skilled in the language of the prisoner.

It is clear from the text of the judgment that the Court of Appeal was of opinion and held that the language of the defence meant the language of the prisoner.

My attention was called by the prisoner's counsel to the case of *Regina* v. *Sheehan* (1897), 1 Can. C.C. 402, 6 Que. Q.B. 137, which was decided by myself, but in that case the prisoner declared that his language was the French language, and the statement was not contradicted, and moreover it is assumed in the decision rendered that French was his tongue. That case is, therefore, not in point, and cannot be invoked as a precedent. In the present case, the language of the prisoner, as a matter of fact, is the English and not the French language, and she was entitled to claim a jury composed for one-half at least of jurors speaking or skilled in that language, but not of jurors speaking or skilled in the French language. She had an absolute right, upon her arraignment, to claim a mixed jury to be so composed, but she had no option as to whether one-half of the jurors should be English-speaking or French-speaking persons.

The plaintiff's motion for a jury composed for one-half at least of persons skilled in the French language is therefore dismissed.

Motion dismissed.

O. Desmarais, for the Crown.

A. E. Poirier, for the prisoner.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., AND STREET, J., SITTING AS A DIVISIONAL COURT.

THE QUEEN v. CUNERTY.

Certiorari—Review of findings—Ontario Liquor License Act—Sale by shop licensee—Selling "in quantities of not less than three half pints"—Concurrent sales to one purchaser—Total purchase above the prohibited quantity.

1. In certiorari proceedings the court will not review the magistrate's finding upon a question of fact which he was competent to try, although an affirmative finding as to such fact is essential to the validity of the conviction.
2. Whether the disposal at the same time and to the same purchaser by a shop licensee, of a quantity of intoxicating liquor of less than three half-pints and of intoxicating liquor of another kind and put up separately which together made the total quantity purchased more than three half-pints, constitutes a "selling, bartering or trafficking" in liquors in quantities of not less than three half-pints is a question of fact for the decision of the magistrate, and a conviction therefor under the Liquor License Act (Ont.) should not be quashed if the magistrate's finding is that the sale was in prohibited quantities.

ARGUED: November 27, 1894.

DECIDED: December 19, 1894.

On 4th September, 1894, the defendant, Terence Cunerty, was convicted before the deputy police magistrate for the city of Toronto for that he, having a shop license, did on 8th August, 1894, unlawfully sell liquor in less quantity than three half-pints, and was fined $20 and costs.

The evidence before the magistrate showed a sale of a quart bottle of ale, and a flask of brandy containing less than three half-pints, the bottle and flask containing together more than three half-pints. The magistrate held that an offence against the Liquor License Act had been committed by such sale.

The Revised Liquor License Act, 1887, enacts that :—

"'Shop license' shall mean a license for selling, bartering

or trafficking by retail in such liquors in shops, stores, or places other than inns, ale or beer houses, or other houses of public entertainment, in quantities not less than three half-pints at any one time, to any one person, and at the time of sale to be wholly removed and taken away, in quantities not less than three half-pints at a time:" R.S.O. 1887, ch. 194, sec. 2, sub-sec. 3.

The following judgment was delivered by

Mr. R. E. KINGSFORD, Deputy Police Magistrate:

The evidence in this case for the prosecution shows that the sale consisted of a quart bottle of ale and a flask of brandy containing less than three half-pints, and I have to decide whether this sale is lawful or not. The defendant has a shop license, and by virtue of that license he is empowered to sell liquor in quantities not less than three half-pints at any one time to any one person. The liquor so sold must at the time of sale be wholly removed and taken away in quantities not less than three half-pints at a time. If the bottle of beer and the flask of brandy are added together, then the person bought more than three half-pints. If the brandy is considered separately from the beer then the person bought less than three half-pints.

I do not think that the paying for the ale and then paying for the brandy separately makes these two purchases separate purchases. In my opinion it was one transaction within the reasonable meaning of the Act. The true question is, is the whole sale legal or illegal? Suppose the purchaser had bought a quart bottle of beer and a pint bottle of beer thus making over three half pints of beer would the sale be illegal? This is a simple case, but must be decided on the same principles.

The wording of the Act is specific enough. In the case of tavern licenses liquor may be sold in quantities of less than one quart. The word quantity is defined by Webster as follows: "That property of anything which may be increased or diminished; an indefinite extent of space; a portion or part." Synonyms are weight, bulk, measure,

amount. Therefore under a tavern license liquor may be sold in quantities, portions, or measures of less than one quart. In shop licenses the liquor may be sold in quantities, portions, or measures not less than three half pints. How can the sale of a quantity or a portion or a measure, less than three half pints be legal if the sub-section relating to shop licenses had simply stated that the holder of such a license might sell "not less than three half pints at any one time to any one person," omitting two words "in quantities"? Then it would be possible for a man to buy a quart bottle and a pint bottle of beer at the same time because he was buying not less than three half pints; or he might buy a quart bottle of one liquor and less than three half pints of another liquor at any one time, because he would be buying not less than three half pints of liquor. But the Legislature has used the words "in quantities not less," or according to the definition of the word quantity 'in portions or parts not less or in measures not less than three half pints.' I cannot strike out these two words, and I therefore feel justified in holding that the sale of any single quantity, measure or portion of liquor less than three half pints—even if accompanied by the sale of a quantity, portion or measure of the same liquor, or another liquor—is an infraction of the Act.

The vendor is also bound to see not only that the quantity he sells exceeds three half pints, but also that it must be wholly removed and taken away in similar quantities. Had the Legislature intended that the holder of a shop license could make up the quantity of three half pints by adding together several smaller quantities, that is to say, if they had intended that the three half pints might be made up by smaller parcels or by adding portions of one parcel to another they would have used the same mode of expression as they have used in dealing with tavern licenses, as above mentioned. In other words, they would have stated in what manner, either generally or specially, the three half pints might be made up. Whether the words used correctly carry out the policy or intention of the Legislature is not a matter for consideration by me. All I have to do is to take the words as I find

them and give them what seems to me to be their true interpretation.

The defendant must be convicted. I see no reason to disbelieve the crown witnesses solely because they are informers.

On the 24th September, 1894, the defendant moved before Rose, J., sitting in Chambers, for a certiorari to remove the conviction and evidence into this Division, upon the ground that the evidence showed a sale of more than three half-pints of intoxicating liquor, and therefore no offence against the Act was proved, and the conviction was irregular and illegal.

ROSE, J., gave judgment immediately after the argument of the motion, refusing to order the issue of a certiorari.

At the Michaelmas Sittings of the Divisional Court, 1894, the defendant moved by way of appeal from the order of Rose, J., for an order for a certiorari, upon the same ground.

Haverson, for the defendant. The magistrate found that the ale and brandy together amounted to more than three half-pints. The sale was to one person, and if the articles were not sold "at one time" literally and exactly, they were taken away at the same time. The fact that there were two different kinds of liquor does not make it a sale of less than three half-pints. The Act makes no such distinction. Nor does the fact that the liquors were contained in two different vessels, each containing less than three half-pints, make it such a sale. More than three half-pints were taken away at one time, and that is the gist of the matter. I refer to *Fairclough* v. *Roberts*, 24 Q.B.D. 350; *Regina* v. *Scott*, 34 U.C.R. 20; *Morris* v. *Tharle*, 24 Ont. R. 159.

J. R. Cartwright, Q.C., for the Crown. There were really two sales, each, or one of the two, of less than three half-pints. Looking at sub-secs. 2, 3 and 4 of sec. 2, that is the reasonable view.

TORONTO, December 19, 1894.

The judgment of the Court was delivered by

STREET, J.—

It was understood upon the argument that we were to consider this application as if it were a motion to quash the conviction, and to refuse it unless we were of opinion that the judgment appealed from is wrong, or that it could not be reversed.

We have come to the conclusion that if the conviction and proceedings were removed into this Court by certiorari and a motion thereupon made to quash the conviction, the motion must be dismissed, for the reason that we have no power upon such a motion to review the decision of the police magistrate in a matter within his jurisdiction. It was plainly a matter within the jurisdiction of the police magistrate to determine upon the charge before him, as a simple matter of fact, whether the defendant had or had not sold liquor in less quantity than three half-pints, which as the holder of a shop license he was forbidden to do, and we cannot review his finding upon the point. There is no question raised as to the jurisdiction of the police magistrate to try the question.

The law upon the subject has been stated in many cases. In *The Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, at p. 443, Sir James Colvile thus puts it: "But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide." See also the cases cited in *Regina* v. *Grainger*, 46 U.C.R. 382.

For this reason we think the motion must be dismissed, but we are not to be taken as assenting to the view of the deputy police magistrate upon the construction of the statute.

Appeal dismissed.

Note: *Sale by shop licensee—Prohibited quantity.*

The Ontario Liquor License Act expressly declares that "three half pints" shall, where *bottled liquor* is sold, be held to be equivalent to five quarter pints Imperial measure. 44 Vict. (Ont.) c. 27, s. 3; R.S.O. 1887, c. 194, s. 2 (5); R.S.O. 1897, c. 245, s. 2 (5). And by the last mentioned statute (sec. 2, s-s. 2) the term "liquor" shall include "all spirituous and malt liquors, and all combinations of liquors and drinks and drinkable liquids which are intoxicating."

The statutory definition of the term "shop license" was changed by Ont. Stat. 1897, 60 Vict. c. 50, s. 4, now incorporated in cap. 245 of the Revised Statutes of 1897 as subsection 3 of sec. 2 of "The Liquor License Act," which declares that—

"'Shop license' shall mean a license for selling, bartering or trafficking by retail in such liquors in shops, stores or places other than inns, ale or beer houses, or other houses of public entertainment, in quantities *of* not less than three half-pints, *or if sold in unbroken packages, not less than one half-pint*, at any one time, to any one person, and at the time of sale to be wholly removed and taken away, in quantities *of* not less than three half pints *or one half-pint* at a time, *as the case may be.*"

The italics indicate the words which have been introduced into the statutory definition since the decision of *The Queen* v. *Cunerty*, supra.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, TOWNSHEND, AND MEAGHER, JJ. AND GRAHAM, E.J.

THE QUEEN v. HURLBURT.

Certiorari—Appeal from order granting writ—Motion to quash conviction pending appeal.

1. Where an appeal is pending from an order granting a writ of certiorari, but the writ has notwithstanding the appeal been issued and the conviction has been returned thereunder, the court will postpone the hearing of a motion to quash the conviction until after the appeal is disposed of.
2. The same rule applies where the certiorari is in respect of a forfeiture order only, and the motion to quash is in respect of a conviction upon which the forfeiture order is based, and which was returned with it.

ARGUED: December 2, 1893.

DECIDED: December 11, 1893.

A charge had been brought against Hurlburt for an alleged offence against the Canada Temperance Act, and he had been summarily convicted before a magistrate, and an order had also been made for the forfeiture of certain intoxicating liquor found on the premises occupied by the accused.

An order was thereupon granted by Weatherbe, J. for a writ of certiorari to remove the order of forfeiture into this court; and from this order an appeal was taken which has not yet been brought to a hearing. The writ of certiorari was issued and served, and the magistrate with his return sent both the order of forfeiture and the conviction on which it was based.

The present motion was to quash the conviction sent up as part of the record in answer to the certiorari.

Roscoe, for the motion.

Fulton, contra.

HALIFAX, December 11, 1893.

RITCHIE, J.—

The question as to whether the order of Mr. Justice Weatherbe for the certiorari can be sustained is still undetermined, and until that has been decided and the record shown to have been legally removed into this court, I do not think any motion should be heard to quash it or any portion of it.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C. J. C. P. AND ROSE, J.

THE QUEEN v. HUGHES.

Railway Act (Can.) secs. 273, 283—Powers of a 'railway constable'—Offenders taken before justice of county other than that where offence committed—Jurisdiction of magistrate—'Taken,' meaning of as to person apprehended—Cr. Code 566—Code form OO.

1. A person summoned but not arrested for trespassing on a railway track, is not liable to be tried elsewhere than in the local jurisdiction wherein the offence was committed.
2. Section 283 of the Railway Act (Can.) 51 Vict., c. 29, authorizing a railway constable to "take" persons offending against the provisions of that Act, and punishable summarily, before a justice for any county, etc., within which such railway passes, and giving such justice jurisdiction to deal with such a case, as though the offence had been committed "within the limits of his own local jurisdiction," applies only where the offender has been *arrested* by railway constable.
3. *Semble*, the provisions of sec. 283 of the Railway Act apply only to arrests made by a railway constable without a warrant under the provisions of that Act, and not to a case where an information is laid and a warrant is issued instead of a summons to bring the offender before the justice to answer the charge.

ARGUED: May 25, 1895.

DECIDED: June 29, 1895.

On February 9, 1895, *DuVernet* obtained a rule *nisi* to quash a summary conviction of the defendant by a justice

of the peace in and for the county of York "for that he, the said Edward Hughes, did on the 7th day of July, 1894, unlawfully trespass on the track of the Grand Trunk Railway Company of Canada, between Queen street and Pape avenue, in or near the city of Toronto, contravening the Railway Act of Canada, 1888, section 273."

The Railway Act of Canada, 51 Vict., ch. 29, provides as follows:

Section 273—"Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars."

Section 283—"Any such constable" (railway constable) "may take such persons as are punishable by summary conviction for any offence against the provisions of this Act, or any of the Acts or by-laws affecting the railway, before any justice or justices appointed for any county, city, town, parish, district or other local jurisdiction within which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the persons taken within the limits of his own local jurisdiction."

The principal ground of objection to the conviction was want of jurisdiction on the part of the Justice, owing to the offence having been committed within the city of Toronto, for which there is a police magistrate.

It was shown that the defendant was not arrested and brought before the justice, but was summoned.

TORONTO, May 25, 1895.

Du Vernet moved the rule absolute.

Aylesworth, Q.C., showed cause.

TORONTO, June 29, 1895.

ROSE, J.—

By consent of counsel the only questions submitted to us were: (1) Whether a justice of the peace for the county of

York has jurisdiction under sec. 283 of the Railway Act, 51 Vict., ch. 29 (Can.), to try outside of the city of Toronto a person charged with having walked along the track of the railway within the city, in contravention of the provisions of sec. 273 of the same Act. (2) If he has such jurisdiction in any case, whether it is not confined to cases where the offender is brought before him in custody.

I am of the opinion that sec. 283 applies only where the constable arrests an offender and takes him before a justice of the peace.

The language is: "Any such constable may *take* such persons . . . before any justice or justices appointed for any county . . . within which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the person *taken* within the limits of his own local jurisdiction."

The word "taken" evidently is synonymous with "apprehended," and we find it so used in the forms; and the word "take" would not be applicable to the case of a person summoned to appear, for he would not be taken, but would appear or attend.

We find the word "take" used in sec. 566 of the Criminal Code, with reference to a person who had been "apprehended." See also Form "OO" in schedule 1 to the same Act, where it means "arrest," or "apprehend."

I the more readily come to this conclusion as it seems to me that the provisions of sec. 283 were made to meet the case of a person arrested upon a train—or by the servants of a railway company while engaged on a moving train—and where, in the very necessity of the case, it might be impracticable to take the offender before a magistrate having local jurisdiction.

Such necessity would not arise where an information was laid upon which a summons or warrant might issue. In such a case probably the usual procedure must be followed. This in some cases would be convenient and in others not.

No good reason appeared to us on the argument why the prosecution in this and other similar cases was not before the

police magistrate for the city. For all that appears it would have been more convenient.

The conviction must be quashed, but, under the circumstances appearing on the argument, without costs, and with the usual order of protection.

MEREDITH, C. J., concurred.

Conviction quashed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE AND MEAGHER, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. DOYLE.

Indictment—Form of—Offence against statute—Description—Offence not stated to be "against the form of the statute," etc.—Cr. Code 413, 414, 610, 611, 629.

1. It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity."

ARGUED: July 6, 1894.
DECIDED: July 6, 1894.

Crown case reserved. The prisoner had been convicted at Pictou on an indictment for unlawfully breaking and entering a shop with intent to steal, and for stealing certain goods described. (Cr. Code, secs. 413 and 414.)

The prisoner's counsel, on demurrer before plea of 'not guilty,' contended at the trial that the indictment was bad, because, charging a statutable offence, it did not conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity," and moved to quash

the indictment because of the omission. The motion was refused by the trial judge; but on the prisoner being convicted, the question was reserved for the consideration of this Court whether the indictment was good without such words.

The Criminal Code provides as follows:

"610. It shall not be necessary to state in any indictment that the jurors present upon oath or affirmation.

"2. It shall be sufficient if an indictment begins in one of the forms EE in schedule one hereto, or to the like effect.

"3. Any mistake in the heading shall upon being discovered be forthwith amended, and whether amended or not shall be immaterial."

"611. Every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified.

"2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

"3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any words sufficient to give the accused notice of the offence with which he is charged.

"4. Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count.

"5. A count may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the sufficiency of such count the Court shall have regard to such reference.

"6. Every count shall in general apply only to a single transaction."

"629. Every objection to any indictment for any defect

apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the Court or judge before whom the trial takes place, and every Court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act."

C. D. McDonald and *J. J. Power*, for the prisoner. The defect could have been cured under the Criminal Procedure Act, R.S.C., c. 174, s. 128, but that section is not re-enacted in the Criminal Code, 1892; and section 629 of the Code does not apply.

[RITCHIE, J., referred to sec. 611.]

By reason of the omission, there is no offence disclosed in the indictment. Taschereau's Crim. Code 675; sec. 610 of the Code specifies in particular certain things which shall not be necessary.

[WEATHERBE, J.—Sections 610 and 611 say in a negative way that all that is necessary is to state, in a popular way, that a crime has been committed.]

Longley, Q.C., Attorney-General, contra.

HALIFAX, July 6, 1894.

At the conclusion of the argument of the prisoner's counsel, the following judgment was delivered by

MCDONALD, C.J.—

The Court do not desire to call upon the Attorney-General. We are all of opinion that the indictment is sufficient.

Conviction sustained.

Note: *Indictment—Formalities of—What defects amendable—Cr. Code 611, 629.*

Judge Taschereau, in his book on the Criminal Code (1893), p. 675-678, says: "The first sub-section of this sec. 611 cannot probably bear the construction that the wording of it, taken literally, would at first suggest. The whole Act, taken together, does not seem to allow of such a construction. . . . Sub-section 2 of sec. 611 may perhaps dispense with, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter *necessary to be proved.* . . . Sub-section 3 will probably not receive a wider construction than the same enactment as reproduced in sec. 734, as to indictments for any offence against this Act, has heretofore received. . . . Sub-section 2 of this sec. 611 assumes negatively that all matter of fact necessary to be proved must be alleged in the indictment. It still remains the rule that an indictment which does not substantially set down all the elements of the offence is void."

There is a difference between an indictment which is bad for charging an Act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot. *R.* v. *Waters*, 1 Den. C.C. 356. If a substantial ingredient of the offence does not appear on the face of the indictment, the Court will arrest the judgment. Cr. Code, sec. 733 (2); *R.* v. *Carr*, 26 L.C. Jur. 61; *R.* v. *Lynch*, 20 L.C. Jur. 187. If the indictment is in such a form that it does not charge an offence, the Court cannot allow an amendment to remedy the defect. *R.* v. *Flynn*, 18 N.B.R. 321; *R.* v. *Norton*, 16 Cox C.C. 59; *R.* v. *James*, 12 Cox C.C. 127; *R.* v. *Morrison*, 18 N.B.R. 682. Nor is an amendment to be made if it change the nature and quality of the offence. *R.* v. *Wright*, 2 F. & F. 320.

If the indictment charges no crime, the defect is a matter of substance and not amendable, and the Court is obliged to arrest the judgment. *R.* v. *Carr*, 26 L.C. Jur. 61; *R.* v. *Wheatley*, 2 Burr. 1127; *R.* v. *Turner*, 1 Moo. 239; *R.* v.

Note—*Continued.*

Webb, 1 Den. C.C. 338. And a plea of guilty is not a waiver, and does not prevent the defendant from moving in arrest of judgment as to defects apparent on the record. *R.* v. *Brown*, 24 Q.B.D. 357.

But if the defect is one which the Court has the *power to amend*, section 629 of the Code then applies, and the objection must be raised before plea. *R.* v. *Mason*, 22 U.C.C.P. 246.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., C.P., AND ROSE, J., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. PATTERSON.

False pretences—Indictment on charge other than one on which prisoner was committed—New charge founded on depositions before magistrate—Motion to quash—Particulars—Amendment of indictment—Accused 'misled or prejudiced in his defence'—Cr. Code 611, 616(2), 641(1), 723.

1. An indictment for obtaining money under the false pretence that the prisoner had in his warehouse certain produce belonging to the person from whom the money was obtained will not be quashed under sec. 641 of the Criminal Code, although the offence for which the accused was committed for trial was that of stealing the produce mentioned, if the facts disclosed on the depositions taken before the magistrate were sufficient to found a charge of false pretences.
2. When the false pretence was erroneously laid in the indictment as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial judge may allow an amendment of the indictment to conform with the proof. (Cr. Code 723.)
3. Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. (Cr. Code 723.)

ARGUED: June 1, 1895.
DECIDED: June 29, 1895.

Case reserved by Mr. Justice Street, at the Chatham Assizes.

The prisoner was charged before the police magistrate at Chatham, on February 17th, 1894, with stealing 2,200 bushels of beans, the property of Nathan H. Stevens, and was committed for trial on that charge.

At the Spring Assizes for the County of Kent, held at Chatham, Ont., on April 9th, 1895, an indictment was preferred against the prisoner, not for stealing the beans, but for obtaining from the prosecutor by false pretences two cheques, the false pretences alleged being "that there was then a large quantity of beans, to wit, 2,680 bushels of beans, the property of the said Nathan H. Stevens, in the warehouse of the said Archibald Patterson, situated on Erie Street, in the Village of Ridgetown, and that two carloads of beans that had been sold by said Nathan H. Stevens were not the property of the said Nathan H. Stevens."

Before the accused was given in charge to the jury, he applied, under section 641 of the Criminal Code, 1892, to the presiding Judge to quash the indictment, upon the ground that he had not been committed for trial on the charge for which it was preferred, and that the indictment was not for any charge founded upon the facts or evidence disclosed on the depositions taken before the police magistrate, nor was it otherwise authorized under that section.

The application to quash was refused, and the trial therefore proceeded; and during its progress, against the objection of counsel for the accused, the indictment was amended by striking out the words "a large quantity of beans, to wit," and upon the indictment, as so amended, the accused was convicted.

The evidence taken at the preliminary investigation before the police magistrate formed part of the case reserved.

The questions to be determined are:

1. Were there facts or evidence disclosed on the deposi-

tions taken before the police magistrate upon which the indictment could or ought to have been preferred under section 641 of the Criminal Code, and ought the accused to have been put upon his trial upon the said indictment, or ought the same to have been quashed?

2. Ought the indictment to have been amended and the trial proceeded with after such amendment under section 723 of the Criminal Code?

Section 641 of the Criminal Code, 1892, is as follows:

"641. Anyone who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the *facts or evidence disclosed on the depositions* taken before the justice. The accused may at any time before he is given in charge to the jury apply to the Court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the Court shall quash such count if satisfied that it is not so founded. And if at any time during the trial it appears to the Court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the Court may then quash such count and discharge the jury from finding any verdict upon it.

(2) The Attorney-General, or anyone by his direction, or anyone with the written consent of a judge of any Court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any Court specified in such consent; and any person may prefer any bill of indictment before any Court of criminal jurisdiction by order of such Court.

(3) It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

(4) Save as aforesaid no bill of indictment shall after the commencement of this Act be preferred in any province of Canada."

Sub-section (1) of sec. 723 of the Code enacts that "If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular supplied as provided in sections six hundred and fifteen and six hundred and seventeen, the Court before which the case is tried may, if of opinion that the accused has not been *misled or prejudiced in his defence* by such variance, amend the indictment or any count in it, or any such particular, so as *to make it conformable with the proof.*"

Sub-sections (4) and (5) of the same section are as follows:

"723 (4) In determining whether the accused has been *misled or prejudiced in his defence*, the Court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

(5) Provided that the propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and that the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other decision on a point of law."

By sec. 611, s-s. (4), of the Code, "Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count."

Sub-sections (2) and (3) of section 616 also provide as follows:

616 (2) No count which charges any *false pretense*, or any fraud, or any attempt or conspiracy by fraudulent means,

shall be deemed insufficient because it does not set out in detail in what the false pretenses or the fraud or fraudulent means consisted: Provided that the Court may, if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

(3) No provision hereinbefore contained in this part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of section six hundred and eleven. R.S.C., c. 174, s. 107.

TORONTO, June 1, 1895.

Clute, Q.C., for the prisoner. This is the first case under the Act, so far as I can find. What was made the subject of the charge to the grand jury is not to be found anywhere in the depositions: see Taschereau's Criminal Code, pp. 739-741. The broad rule is, you must prove the indictment as laid: Roscoe's Criminal Evidence, 11th ed., at p. 194; Beale's Cases on Criminal Law, p. 45; Archbold Pleading and Evidence, 20th ed., at p. 230.

[MEREDITH, C.J., referred to *Taylor* v. *The Queen* (1895), 1 Q.B. 25.]

See also Taschereau's Criminal Code, sec. 359, pp. 398-9; Archbold Pleading and Evidence, 20th ed., at p. 250.

J. R. Cartwright, Q.C., for the Crown. The only question is, Would the accused person be misled or prejudiced in his defence if the amendments sought be allowed? Was he deprived of anything of which he has cause to complain? The real question here was as to the false pretence of representing that there was this particular quantity of beans. The amendment here was made so as to conform with the evidence.

TORONTO, June 29, 1895.

MEREDITH, C.J.—[After stating the facts as above set out]:

A perusal of the depositions taken before the police

magistrate makes it abundantly clear that the facts or evidence disclosed on them were sufficient to found a charge of false pretences against the accused. The evidence of the prosecutor Stevens discloses the fact that the cheques which form the subject of the indictment were obtained upon the representation of the accused that he had, at the time the cheques were got by him, 2,680 bushels of beans in the warehouse of the accused, the property of the prosecutor, and that that representation was untrue; and we think, therefore, that there is no doubt that an indictment might have been preferred against the accused for obtaining the cheques by means of that false pretence; but it was urged by counsel on his behalf that the charge, as originally laid in the indictment, was a different one from that disclosed in the depositions; that a charge of obtaining the cheques by the false pretence that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," was a substantially different charge from one where the false pretence was alleged to be that there was in store "2,680 bushels of beans."

It is no doubt true that upon an indictment charging the false pretence in the former of these terms the words following the words "to wit" were not required to be proved, and that the charge in that case was in substance that the false pretence was that there was then in store a *large quantity* of beans.

To give to the enactment in question the meaning contended for would, in my opinion, be to place upon its language altogether too narrow and restricted a construction.

Before the adoption of the Criminal Code, except in cases to which section 140 of the Criminal Procedure Act applied, there was no such limitation of the right to prefer an indictment as is now contained in section 641 of the Code, but in accordance with the recommendations of the report of the Royal Commissioners on the English Draft Code, 1878, pp. 32, 33, the Parliament of Canada, in codifying the criminal laws of the Dominion, extended the substance of the provisions of section 140 to the case of all indictments.

As pointed out by the Royal Commissioners, their recommendation was based upon what they deemed the manifest injustice of permitting an indictment to be preferred to a grand jury sitting in secret and without any opportunity to the accused of being heard, and a bill being found, and the accused placed upon trial upon what might turn out to be a wholly unfounded charge, without any preliminary investigation or even notice of the nature of the charge which was intended to be preferred against him.

Section 616 of the Criminal Code provides that no count in an indictment which charges any false pretence shall be deemed insufficient if it does not set out in detail in what the false pretence consisted, and the law had, for many years before, permitted a charge of false pretences to be laid in that way.

Having regard to that provision and the reasons which led to the enactment and the evident objects of section 641, I am of opinion that inasmuch as the evidence before the police magistrate disclosed a case of false pretences in respect of the 2,680 bushels of beans, the prosecutor was entitled to prefer the indictment which he did prefer, and that the fact that the false pretence was erroneously laid as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," did not form a ground for quashing the indictment as having been preferred without lawful authority. The accused had notice of the nature of the complaint which the prosecutor made against him, and that it in law amounted to a charge of false pretences, and the substance of the charge was that he had obtained the prosecutor's money by falsely representing that he had in store "2,680 bushels of beans." He must be taken, I think, to have known that under the ample powers of amendment which the Courts now possess in criminal matters the charge which was in fact made against him would be investigated, and that any amendment of the record necessary to enable that to be done could and would be made.

It is clear, it seems to me, that had the indictment

charged that the cheques were obtained by false pretences without alleging in what the false pretence consisted, it would have been fully authorized by section 641. Why, then, should the addition of the words unnecessarily setting out in what the false pretences consisted render the indictment liable to be quashed as having been preferred contrary to the provisions of the section? I am of opinion that it did not, and that it is enough that the facts or evidence disclosed on the depositions were sufficient to found a charge of false pretences in respect of the same subject-matter which was the foundation of the charge of stealing upon which the accused was committed for trial.

Regina v. *Broad,* 14 U.C.C.P. 168, though the point which arose there was not precisely the same as that with which we have to deal, supports the view which I have endeavoured to express as to the proper construction of such an enactment as that which I am considering. See also section 611 of the Criminal Code.

I am of opinion, therefore, that the first question must be answered in the affirmative.

With regard to the second question, it must be taken that the learned Judge at the trial was of opinion that the accused was not misled or prejudiced in his defence by the variance between the evidence given and the charge in the indictment, and that question is not now open; that being so, the learned Judge was, I think, fully warranted in making the amendment which was allowed, and the trial was properly proceeded with after that amendment: Section 723.

If it were, however, intended that the case should raise the question whether the accused was misled or prejudiced in his defence by the variance, upon the material before us I am of opinion that he was not and that he ought to have been prepared to meet the charge of false pretences which formed the subject of the inquiry before the police magistrate, and which he had, probably, good reason for thinking was intended to be covered by the language used in the indictment, the legal effect of which the framer of the indictment may not have fully apprehended when he drew it.

I would answer the second question also in the affirmative.

In the result the conviction is affirmed.

ROSE, J.—

If the indictment had been framed without setting out in detail in what the false pretence consisted, the objection here urged could not have been raised. Nor do I think it would in anywise have been open had there been served under such a count particulars in the words appearing in the bill found by the grand jury. Then, may not the indictment be treated as one charging a false pretence and giving particulars of such pretence? The Code provides for amending particulars, and if the count here had not set out in detail the false pretence, but particulars had been served, then such count being sufficient, an amendment of the particulars under section 723 would not have caused any vice to appear in the proceedings. Equally it seems to me is the amendment of the particulars in the count permissible and unobjectionable.

The count, as amended, was sustained by evidence both on the preliminary hearing and at the trial, and it would be a misfortune if, on an objection purely technical, it was necessary to interfere.

I agree that the questions must be answered for the Crown.

Conviction affirmed.

Note: *False pretences — Indictment—Stating nature of the false pretence—Description of offence—"Details" of the circumstances—Cr. Code 611, 616.*

Sec. 616 (2) of the Criminal Code makes an indictment which *charges* any false pretence, etc., valid, although it does not set out *in detail* in what the false pretence consisted. This, it is submitted, does not mean that the false pretence need not be set out *at all.*

While Meredith, C.J., in his judgment, *supra*, speaks of the "addition of the words *unnecessarily* setting out in what the false pretences consisted," and expresses the view that the indictment would have been fully authorized by sec. 641

Note—*Continued.*

if laid "without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out *in detail.*

Form FF (*c*) of the Code gives as an "example of the manner of stating" a charge of false pretences :

"A obtained by false pretences from B, a horse, a cart, and the harness of a horse, at —— on ——."

And by Cr. Code 982 the several forms *varied to suit the case*, or forms to the like effect, shall be deemed "good, valid and sufficient in law."

It is submitted, however, that the Forms FF cannot override the express requirement of sec. 611, which demands that every count of an indictment shall be in "words sufficient to give the accused notice of the offence with which he is charged" (sub-sec. 3). Sub-sec. 4 of sec. 611 is in its terms confined to the setting forth of *details* of the circumstances of the alleged offence, and it is submitted that to state what the false pretence was, is a matter rather of *describing* the offence, than of detailing the circumstances. Moreover, the false pretence, and not the mere fact of obtaining the property, would seem to be the gist of a charge of obtaining goods by a false pretence.

It seems probable also that sec. 616 (2) applies only where the false pretence, etc., is *charged* against the accused, and if the charge were for knowingly "receiving" goods obtained by false pretences, it would be necessary to look at the law as it was before the Code to find whether or not the false pretence should be particularized.

In the case of *Taylor* v. *The Queen* (1895), 1 Q.B. 25, referred to *supra*, it was held that an indictment for *receiving* goods, knowing the same to have been unlawfully obtained by false pretences, is good without setting out the false pretences, for, the gist of the offence being the *receipt of the goods with knowledge* that they had been unlawfully obtained by *some false pretence*, it is sufficient to so allege without specifying the *nature* of the pretence (Mathew, J., and

Note—*Continued.*

Charles, J.) The court there refused to treat as a binding authority the unreported case of *Reg.* v. *Hill* decided in 1851 and noted in 2 Russell on Crimes, 5th ed. 482, 6th ed. 437, in which the contrary had been held at the Gloucester Assizes. Mathew, J., said that for many years it had been the practice not to set out the particular false pretences by which the money or goods were alleged to have been obtained, in an indictment for "receiving"; and Charles, J., decided the case "on the broad ground that the indictment contains all the allegations which it is necessary to prove in order to bring home the offence charged to the defendant."

In *The Queen* v. *Broad* (1864), 14 U.C.C.P. 168, it was held by the Court of Common Pleas of Upper Canada that an indictment was valid where a prosecutor had been bound by recognizance to prosecute and give evidence upon a certain trial, notwithstanding that there was a variance between the specific perjury charged in the information and the specific charge of perjury contained in the indictment, and although the statute then in force, 24 Vict. (Can.), ch. 10, sec. 10, forbade an indictment for certain offences named, including perjury, unless a recognizance had been given to "prosecute or give evidence against the person *accused of such offence*," or unless the accused had been committed or bound over to "answer to an indictment to be preferred against him *for such offence*," etc. John Wilson, J., in delivering the judgment of the court, said: "If the indictment set forth the *substantial charge* contained in the information, so that the defendant had *reasonable notice* of what he had to answer, we should incline to think this a compliance with the statute, and would refuse to quash the indictment." (Richards, C.J., Adam Wilson, J., and John Wilson, J.)

Amendment of indictment—Cr. Code 611.

See Note to *The Queen* v. *Doyle* (N.S.), 2 Can. C.C. 338 ante.

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE DUBUC, KILLAM AND BAIN, JJ.

THE QUEEN v. HODGE.

Receiving stolen goods—Counselling or procuring the theft—Conviction for both offences—Liability of accessory as principal—Cr. Code 61.

1. The receiving of goods merely as an act done in the commission of the theft does not constitute a separate offence of receiving stolen property knowing it to have been stolen.
2. If the accused were not an aider and abettor or a principal in the second degree in the commission of the theft, the circumstance that he was an accessory before the fact by counselling and procuring the commission of the theft, and therefore liable under sec. 61 of the Criminal Code to be convicted as a principal, does not prevent his conviction for the substantive offence of afterwards receiving the stolen property knowing it to have been stolen.
3. Such an accessory before the fact who afterwards becomes a receiver of the stolen property may be legally convicted both of the theft and of 'receiving.'

ARGUED: December 6, 1898.

DECIDED: December 10, 1898.

Crown case reserved. The prisoner was tried before Dubuc, J., on a charge of receiving stolen property, knowing it to have been stolen; the article stolen was a steer, the property of Charles Ballandyne.

The prisoner was found guilty of the charge. The main evidence on which he was convicted being that of John Pruden, who had stolen the steer and was prosecuted for the theft.

Pruden's evidence was to the effect that the prisoner had repeatedly urged him to bring in a certain stray steer for sale, that he at first refused but afterwards consented, and was furnished by prisoner with a rope to lead the animal with; that he then stole the steer and took it to the prisoner, who received it and gave Pruden $10 for it.

It was shown that the animal was worth about $25.

Counsel for the prisoner contended that on the evidence

of Pruden, Hodge should have been prosecuted for stealing the steer jointly with Pruden, and that he should not be convicted of receiving the stolen property.

The question on which the opinion of the Court was sought was the following :—

Should the prisoner, on the facts and circumstances above stated, be prosecuted for theft, instead of receiving stolen property, and is he on that ground entitled to be acquitted of the offence of receiving stolen property as charged against him ?

Section 61 of the Criminal Code is as follows :—

61. Every one is a party to and guilty of an offence who—

(*a*) actually commits it ; or

(*b*) does or omits an act for the purpose of aiding any person to commit the offence ; or

(*c*) abets any person in commission of the offence ; or

(*d*) counsels or procures any person to commit the offence.

(2). If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.

R. A. Bonnar and *F. Heap* for the prisoner. The evidence for the prosecution was that of an accomplice. If the evidence shows the prisoner was guilty of theft, he could not be convicted of receiving the same article as stolen goods. Under the Criminal Code, 1892, ss. 61, 62, a former accessory is now a principal. The evidence shows that Hodge counselled, urged and procured Pruden to commit the theft. In getting the rope he assisted Pruden and was a principal : *Reg.* v. *Coggins*, 12 Cox C.C. 517. A person cannot be both principal in the second degree and guilty of receiving : *Reg.* v. *Perkins*, 5 Cox C.C. 554 ; *Reg.* v. *Owen*, 1 Moo. C.C. 96 ; *People* v. *Brien*, 53 Hun, (N.Y.) 496. A man cannot receive stolen goods from himself.

George Patterson for the Crown. The "facts" do not include everything that Pruden said: *Rex* v. *Dyer*, 2 East, P.C. 767; *Reg.* v. *McEvin*, Bell's C. C. 20; *Reg.* v. *Hughes*, Bell's C.C. 242; *Reg.* v. *Craddock*, 2 Den. 31; *Reg.* v. *Wade*, 1 C. & K. 737. In *Coggins* case, 12 Cox C.C. 517, the two prisoners were together.

F. Heap in reply. *Reg.* v. *McEvin* is distinguished in *Reg.* v. *Coggins*. A man may conceivably be a receiver of goods stolen by himself. Pollock, C. B., referred to such a case: Russell on Crimes, 6th ed., vol. 1, p. 165; *Reg.* v. *Evans*, 7 Cox C.C. 151.

KILLAM, J.—

The prisoner was charged with and convicted of receiving a stolen steer, knowing it to have been stolen. The principal evidence was such, that, if it was fully accepted, it would have warranted the prisoner's conviction upon a charge of having stolen the animal. The question is whether, in such a case, he could properly be convicted of receiving.

It seems clearly established by such cases as *Rex.* v. *Owen*, 1 Moo. C.C. 96; *The Queen* v. *Evans*, 7 Cox C.C. 151; and *Reg.* v. *Coggins*, 12 Cox C.C. 517, that one who is a principal in a theft cannot be convicted of receiving upon evidence merely of acts constituting him a principal offender. This could hardly be otherwise, for the offence of theft must be complete before that of receiving the stolen article can be committed.

Under the Criminal Code, section 61, acts which formerly constituted an accessory before the fact now constitute the principal offence, and it is claimed that the doctrine of the cases just mentioned is to be applied. I cannot accept this view.

From the report of the case of *Reg.* v. *Craddock*, 4 Cox C.C. 411, it was apparently the opinion of Pollock, C.B., that there might be circumstances under which a party could properly be convicted of receiving stolen goods of which he

was the original thief. I take the true principle to be that it is a receipt which is merely an act done in the commission of the theft, which cannot be treated as a separate offence. And the statute which makes 'counselling' or 'procuring' form a participation in the offence, when committed, does not also make a subsequent receipt form a part of a theft completed before the receipt.

Sub-section 2 of section 61 is directed to offences committed in the prosecution of a common purpose which accessories might reasonably contemplate as likely to flow from the prosecution of the purpose. It does not make the subsequent receipt form part of the prior theft, though contemplated and intended to follow it.

In *Reg.* v. *Hughes*, Bell C. C. 242, the prisoner was indicted jointly with another for theft, and separately for receiving the stolen goods. Hughes was the instigator of the theft, but was not an actual participant in it, although the goods were brought to him in pursuance of the original design. Under the statute 11 & 12 Vic., c. 46, s. 1, an accessory before the fact could be indicted and punished as a principal. Erle, C.J., said: "Upon this evidence the jury might reasonably and legally convict the prisoner of stealing as an accessory, and there is no inconsistency in saying that he is guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen."

While the case did not come up in a manner which makes it a direct authority upon the question now before us, we have not only this expression of opinion, but also the facts that Hughes was convicted upon both counts under the direction of the trial Judge, and that this course was in no way disapproved.

At most, the evidence set out in the reserved case shows that the prisoner was, as to the theft, an accessory before the fact. Mr. Justice Dubuc informs us that he found that the prisoner did counsel the commission of the offence, and if it were important the case could be amended to show this. But Hodge did not actually participate in the theft, which was completed when Pruden took possession of the animal

and drove it off *animo furandi*. It was not then in Hodge's possession. He received it subsequently under an assumed sale and purchase.

In *Rex* v. *Kelly*, Russ. & R. 421, the prisoner set out with another to steal horses. The prisoner stopped at a distance of half a mile from the place where the horses were; his companion went on, stole the horses and brought them to the prisoner, when the two rode off with them. It was held that the prisoner was an accessory only, and wrongly convicted of the theft.

See also, *Rex* v. *King*, Russ. & R. 332; *Rex* v. *McMakin*, Russ. & R. 333, *n* (b); and *Reg.* v. *Gruncell*, 9 C. & P. 365.

In my opinion the conviction should be affirmed.

BAIN, J.—

I agree that the conviction should be affirmed. If the case reserved by the learned Judge had shown, as the counsel for the prisoner seemed to assume that it did, that the prisoner was an aider and abettor, or a principal in the second degree, in the commission of the theft, the objection to the conviction would be well founded, for it is not possible in the nature of things that one can be an active participant in the theft of property and also a receiver of the property in the same transaction. In other words, a man cannot be convicted of receiving stolen property from himself: *Reg.* v. *Evans*, 7 Cox C. C. 151; *Reg.* v. *Perkins*, 2 Den. C. C. 459. But while the case shows that the prisoner counselled and procured Pruden to steal the steer, he was not present when Pruden took it, nor was he at any place near enough to have been able to give Pruden assistance in taking it; and before he received the animal from Pruden, his connection with the matter was only that of an accessory before the fact.

Under section 61 of the Criminal Code, everyone who counsels or procures anyone to commit an offence is deemed to be a party to and guilty of that offence, and so the prisoner might have been indicted and convicted for stealing the steer. But, as there is nothing inconsistent in being an accessory before the fact to a theft and the receiver of the

stolen property afterwards, this provision of the Code should not be held to prevent an accessory before the fact from being indicted and convicted for the substantive offence of receiving. The English Act, 11 & 12 Vic., c. 46, s. 1, declared that whosoever should become an accessory before the fact to any felony might be indicted and convicted as if he were the principal felon; and in *Reg.* v. *Hughes*, 8 Cox C. C. 278, where two counts of the indictment charged Hughes and another prisoner with stealing, and the third count charged Hughes with receiving, and the evidence went to show that Hughes had received the stolen property and had also been an accessory before the fact, and the jury found him guilty on the three counts, the Court on a reserved case affirmed the conviction. Erle, C.J., said: "In our judgment there is no inconsistency in being an accessory before the fact and a receiver afterwards, and we think the jury might reasonably and logically convict the prisoner of both offences." And if he might be convicted of both the offences, he might certainly have been convicted of either of them.

DUBUC, J., concurred.

Conviction affirmed.

Note: *Accessory—Aider and abettor.*

He who is the actor or actual perpetrator of the offence is the principal in the *first* degree; and he who is present aiding and assisting with a felonious intent to commit a felony is a principal in the *second* degree. Stone's Justices' Manual 31st ed. (1899), 94.

An accessory *before the fact* is he who counsels, procures, or commands another to commit the offence, but is not himself present aiding or abetting in the commission of it. An accessory *after the fact* is he who, after an offence has been committed, receives, harbours or assists the principal, knowing him to have committed the offence, and with the intent and design of enabling him to elude the pursuit of justice. Ibid. p. 94.

Note—*Continued.*

Receiving stolen goods—Resumption of possession in transit by owner.

If stolen goods be returned to the thief in order to detect the intended receiver, or if they have once got back into the possession of the owner or the bailee from whom they have been stolen, the receipt of them by the intended receiver is not a receiving of stolen goods knowing them to have been stolen, since they were not stolen property at the time they were received. So where a parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees, and while in the carriers' warehouse their servant stole the same and removed it to a different part of the premises, and placed upon it a label addressed to the prisoners accused of feloniously receiving, but the carriers learning of this retook possession of the property and had it delivered, by their special direction, to the prisoners in a special van accompanied by detectives, it was held that by reason of the resumption of possession by the carriers after the theft, the prisoners whose intention was to receive stolen property had not done so, and that at the time they received same it could not be designated "stolen property." *R.* v. *Villensky* (1892) 2 Q. B. 597, per Coleridge C.J., Smith L.J., Pollock B., Cave and Bruce, JJ.; following *R.* v. *Dolan* (1855) Dearsly C.C. 436, and *R.* v. *Schmidt* (1866) L.R. 1 C.C.R. 15.

[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

THE QUEEN v. CAMPBELL.

Theft — Assisting to conceal stolen property — 'Aiding and abetting'—Continuation of a completed crime— Cr. Code 61 (c).

1. A person who knowingly assists a thief to conceal stolen money which he is in the actual and proximate act of carrying away, by receiving the money for the purpose of concealing it, is guilty of aiding and abetting in the theft, and may under Cr. Code sec. 61 (*c*) be convicted as a principal.
2. Although the theft may be complete by the mere taking and carrying away of stolen property, the subsequent carrying of same to a place of concealment by a person who did not participate in the taking, if done with a guilty knowledge and as a continuation of and proximately at the same time as the theft, is an 'aiding and abetting' of the same.
3. An act done which may enter into the offence, although the crime may be complete without it, may be considered as a continuation of the criminal transaction so as to make the participator an aider and abettor, although his participation occurs only after such acts have been done as in themselves would constitute the crime.

MONTREAL, April 11, 1899.

WURTELE, J.—

An indictment was found against Patrick Campbell charging him, by a first count, with having on the 21st December, 1898, broken into and entered the dwelling house of John Sheridan, situated in the City of Montreal, and with having stolen therein the sum of $900.00, belonging to the latter; and, by a second count, with having received the money, knowing it to have been stolen. On the 15th March, 1899, the petit jury found that he had aided and abetted one Coddy in the commission of the theft, and therefore found that he was a party to the offence and guilty like as a principal under paragraph *c.* of art. 61 of the Criminal Code.

The facts of the case are these :—John Sheridan had placed $910.00 for safe keeping in a certain receptacle in his house

and it was there on the evening of the 21st December last. About eight o'clock that evening, he and the other inmates went out, and on leaving the house he closed and locked the door. He returned shortly before eleven o'clock and found that the door of the house had been broken in and that his money was gone. The prisoner had been courting the maid-servant, Ann Jane Murray, for some time, and John Sheridan suspected that she knew where he had hid his money and had told him where it was. About eleven o'clock, the prisoner entered the tavern kept by Alphonse Poitras with two other men and asked him to take charge of some money for him till the next day; he handed him $910.00 in bills of the same denomination and of the same bank as John Sheridan's money and enclosed in an envelope similar to the one in which it had been put. The tavern-keeper refused to take the money and the prisoner and his companions went away. The prisoner entered the witness box and stated that at about eleven o'clock he had met a man whom he called Coddy, who was in a sleigh, and that Coddy had asked him if he knew of anyone who would take charge of some money for him till the next day and that he took the money and went with Coddy and the driver to the tavern kept by Alphonse Poitras to deposit it with the latter. He admitted that Coddy was a shiftless, disreputable and penniless tramp, whose circumstances did not warrant the possession of any money, that Coddy told him that he had received the money from his father and that he wanted to put it away so that his brothers should not know that he had received it, that he knew that Coddy had neither father nor brothers in Montreal and that he suspected that the money had not come honestly into his possession and that he had told the tavern-keeper that the money was his because he did not want to give the fellow away; he added that after they went out he returned the money to Coddy and that he had never seen or heard of him since.

I charged the jury that they could find the prisoner guilty as the principal actor or actual perpetrator of the theft if, from the fact that the hidden money had been found to have been in his hands a short time after it must have been purloined, they

were satisfied that he was the person that had taken it; or, if they believed that he had received the money from Coddy for the purpose of concealing it and had returned it to him, knowing that he had not come honestly by the money and that the prisoner had thereby aided and abetted Coddy in the commission of the offence, that they could also in that case find him guilty.

I was inclined to think that the prisoner himself had committed the theft, but the jury were of opinion that he had only aided and abetted Coddy and they declared so and under the direction of the court they found him guilty like as a principal under paragraph *c* of art. 61 of the Criminal Code.

The prisoner's counsel has applied for a reserved case on the ground, first, that while the jury had only found the prisoner guilty of aiding and abetting the theft, the clerk had entered a general verdict of guilty; secondly, that the evidence disclosed no crime of aiding and abetting; thirdly, that there was no proof that the prisoner was in the vicinity of John Sheridan's house on the night of the theft; and fourthly, that there had been a misdirection to the jury and that the conviction had been improperly obtained and recorded. They ask me to submit for the opinion of the Court of Appeal among other questions:—"Whether as a question of law, the "prisoner by receiving the stolen money from the thief for "the purpose of finding a safe place of deposit for it during "the night and by having subsequently returned it to the "thief, under the circumstances stated, could be found guilty "of aiding and abetting?" As this proposition sums up the whole case, it is unnecessary to mention the other subordinate questions which are all covered by it.

The contention of the counsel for the prisoner is that the offence was complete when the thief took the money and left the house and before the prisoner intervened, and that consequently he could not aid and abet him in commission of the offence when he took the money which the thief had in his possession in order to deposit it for safe keeping and when he afterwards returned it to him.

I have to see if at that time it was possible for the prisoner

to aid and abet Coddy in carrying out his intention of stealing John Sheridan's money, that is of taking it, of carrying it away and of appropriating it to himself.

Larceny or theft according to the definition of East (2 East P.C. 553) is the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner.

Anciently the actual perpetrator of a criminal act was alone the principal, and all others who before, at, or after the commission of the act in any way participated in it were not deemed to be parties to the offence but were simply accessories. An accessory is one who is not the chief actor in an offence but who is in some way concerned in it either before the act committed, or at its commission, or proximately after the initiatory and main act has been committed, but in the latter case, of course, before the criminal design has been entirely accomplished. The person who participates in the consummation of an offence is an accessory at the fact and a party to the offence; but one whose action tends merely to assist the offender to escape from justice is an accessory after the fact and he becomes guilty of a substantive but different offence. An aider or abettor is one who does some act to help or to render aid in the actual perpetration of a crime and he becomes an accomplice or accessory *at* the fact. The difference between principals and accessories before or at the fact has been abolished and all who either do or omit to do any act for the purpose of aiding any person to commit an offence, abet any person in commission of an offence, or counsel or procure any person to commit an offence are now under the terms of article 61 of the Criminal Code deemed to be parties to the offence and are treated in the same manner as principals and may therefore be tried and convicted under an indictment charging them with having committed it, instead of charging them as formerly with having been accessories to it.

In order to be an aider and abettor it is not necessary that the person who thus participates in an offence should be present

during the commission of some incident constituting the offence; it is sufficient that he aids and abets while a part of the criminal transaction is taking place either at its commencement, or during its progression, or later but proximately at its consummation, or indeed while some act is being done which may enter into the offence though it might be consummated without it.

In the case of theft, the crime is generally complete when the thief takes and carries away the object which he had formed the design to steal. But the act of carrying the object away may be continued until it is placed somewhere so as not to be found upon him, where it will be securely hidden and where he can afterwards get it and appropriate it to himself and convert it to his own use. Although the crime may be complete by the mere taking and carrying away of the article, the act of carrying it to a place where it can be concealed and deposited for safe keeping may enter into the criminal transaction and be a continuation of its commission; and anyone who knowingly assists a thief to conceal stolen property which he is in the actual and proximate act of carrying away renders aid to the actual perpetrator and principal actor and becomes an accessory to the crime and under the provisions of the Criminal Code can be dealt with like as a principal.

In this case, the prisoner, according to his own testimony, assisted Coddy in endeavouring to secrete the stolen money and he aided him afterwards in returning it to him, and in doing these acts he became a participator in the criminal transaction and an accomplice in the commission of the offence. He did not become by his acts an accessory after the fact, as he did nothing to enable Coddy to escape from justice and the assistance which he rendered was really in furtherance of the consummation of the theft.

While Coddy was feloniously carrying away the money and seeking a place where he could safely conceal it, and was doing what was criminal and what entered into and was a continuance of the offence, although it might have been consummated without such action, the prisoner aided and abetted him by seeking to have the stolen money concealed, and afterwards

by returning it to him, and in so doing, he contributed to the result, and therefore became liable to be convicted for the offence under the indictment found against him.

One who knowingly assisted in carrying away or concealing stolen property was formerly dealt with only as an accomplice or accessory at the fact, but such a participator is now deemed a party to the offence and is treated as a principal.

In the case of *Rex* v. *Kelly*, Russ. & R. p. 421, one Whinroe stole two horses; and Kelly, who was aware of the theft, afterwards joined and aided him in riding away with them. Kelly was indicted and convicted as a principal, but it was held that he was only an accessory and the conviction was therefore set aside. Then in the case of *Rex* v. *King*, Russ. & R. p. 332, Hill and Smith, in the absence of King, took some butter and cheese from the prosecutor's warehouse and put the property in the street about thirty yards from the door of the warehouse; they then apprised King of the robbery and he assisted them in carrying the property to a cart which was in readiness at a distance to take it away. It was contended that there was a complete felony before King intervened but it was considered by the judges on a reserved case, that the criminal transaction was still in progression but that King, who had been indicted and convicted as a principal, was only an accessory and that he could not be considered and treated as a principal and that his conviction as a principal was therefore wrong. In both these cases the parties had intervened after the taking of the property but with the knowledge that it had been feloniously taken, and the judges were of opinion that they had participated in the offence but only as accessories and the convictions were set aside not because they were not concerned in the commission of a criminal transaction, not because the offence had been completed before they intervened and assisted in carrying away the stolen property, but on the technical ground that they could not be indicted and convicted as principals.

Now, however, an aider and abettor can be indicted, tried and convicted like as a principal, and if such rule had then

existed it is apparent from the Reports that the convictions against Kelly and King in the cases which I have just mentioned would have been maintained.

I am of opinion, consequently, that I did not misdirect the jury in instructing them that if they believed that the prisoner had knowingly taken the stolen money from Coddy and had knowingly attempted to conceal it for him by depositing it for safe keeping in the hands of Alphonse Poitras, and after the latter had refused to receive it, had knowingly returned it to Coddy, they could find that he had aided and abetted Coddy in the commission or consummation of the theft and that they could convict him as a party to the offence charged and set forth in the indictment, and I am furthermore of opinion that the verdict rendered by the jury is correct and legal.

The verdict rendered by the jury was not that the prisoner was guilty of aiding and abetting, but, being of opinion that he had knowingly aided and abetted Coddy, that he was guilty as a party to the crime set forth in the indictment; and on a general verdict of guilty being recorded under the direction of the Court, they concurred in it.

In answer to the grounds alleged in the motion for a reserved case, I say: (1) That a general verdict of guilty was properly recorded by the clerk; (2) that there was evidence on which the jury could find that the prisoner had aided and abetted Coddy; (3) that the prisoner himself declared that he had met Coddy about eleven o'clock which was shortly after the money was taken and had received it from him to be deposited for safe keeping, and that under the circumstances, it was immaterial if the prisoner had been in the vicinity of John Sheridan's house that evening or not; and (4) that there was no misdirection to the jury and that the verdict was properly rendered.

I am of opinion, under the circumstances of the case, that it could be declared that the prisoner had aided and abetted the thief in the commission of the theft.

I cannot, therefore, reserve the question suggested and I must dismiss the motion asking for a reserved case.

Motion rejected.

J. P. Cooke, Q.C., for the Crown.

R. A. E. Greenshields and *James Cranksharw* for the prisoner.

Note: *Accessory — Aiding and abetting — Receiving stolen goods.*

See *The Queen* v. *Hodge* (Man.) 2 Can. C.C. ante 350 and Note page 355.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

SOUTHERN ALBERTA JUDICIAL DISTRICT.

BEFORE ROULEAU, J.

THE QUEEN v. HENDERSON.

Liquor license—Ordinance 1891-92, N.W.T.—Open bar in prohibited hours—Evidence of liquor license.

1. A conviction under the Liquor License Ordinance, N.W.T., 1891-92, against a hotel-keeper, for allowing his bar to be open during prohibited hours, is invalid, if the information does not allege, nor is proof made, that the accused held a liquor license for the hotel premises.

CALGARY, N.W.T., February 27, 1899.

ROULEAU, J.—

This is a Rule Nisi for a certiorari, and a motion to quash the conviction made by Frederick Champness, a Justice of the Peace.

The principal ground of objection is that there was no evidence adduced on the part of the prosecution that the said Henderson was a person holding a license under the Liquor License Ordinance, nor is it so alleged in the information, charge or minute of judgment, nor was there any evidence produced, nor is the allegation made in any such proceedings, that the alleged offence was committed in a

place where liquor, intoxicating or otherwise, is licensed to be sold.

The information is that William Henderson, hotel-keeper, of the town of Lethbridge, of the firm of Henderson & Downer, did allow his bar to be open at Lethbridge during prohibited hours—to wit, between ten and eleven o'clock on Saturday night on the 6th August, 1898, etc.

The summons reads that the said William Henderson did allow intoxicating liquor to be sold in the bar of the Lethbridge House at Lethbridge during prohibited hours—to wit, between the hours of ten and eleven o'clock on Saturday night, the 6th day of August, 1898. The information is for one offence under s.s. 4 of sec. 59, and the summons is for another offence altogether under sec. 59. But it seems that Henderson was fined under the charge contained in the information.

I think if the evidence was sufficient I could uphold the conviction, notwithstanding that defect, because it is apparent enough, on the face of the proceedings, that Henderson was tried for keeping his bar open during prohibited hours, as provided in the Liquor License Ordinance, 1891-92. But there is an objection which I cannot amend, and which is fatal. It is this: that it is not alleged, nor is it proven by the prosecution, that the defendant held a license for the premises where the bar was kept open during prohibited hours.

In order that a man should be found guilty and fined under sec. 81 of the Liquor License Ordinance, he must be proven to have violated the provisions of sec. 59.

Sub-sec. 4 of sec. 59 provides that no bar-room or room in which liquors are usually sold, in a licensed hotel, shall be kept open, etc. I think that *Regina* v. *Williams*, 8 Man. R. 342, is a direct authority in support of the objection. Also Paley on Convictions, p. 126, and *Reg.* v. *Rodwell*, 5 Ont. R. 188.

Therefore, I hold it is absolutely necessary, in a case like this, that the prosecutor either allege or prove that the defendant was a keeper of a licensed hotel, so as to make

him liable under the provisions of the Liquor License Ordinance, 1891-92.

The conviction will be quashed, and there will be the usual order for the protection of the Justice of the Peace.

Conviction quashed.

Muir, Q.C., for defendant.

McCarthy, Q.C., for the Justice of the Peace and the informant.

Note: *Liquor license—Offence by licensee—Evidence of license.*

Where the facts constituting an offence are all of a *positive nature*, they must be established in proof by the prosecutor before any judgment of conviction can be pronounced, unless the statute which creates the offence exempts the prosecutor from doing so. Paley on Convictions, 6th ed. p. 126, 7th ed. p. 131.

Where the offence is one which can be committed only in a place where intoxicating liquors are licensed to be sold, the fact that the premises were licensed is one of a positive nature, and an essential element in the offence, and unless the statute exempts the prosecutor from making such proof, there could not be a conviction for the offence without proof of the license. *R.* v. *Williams* (1892) 8 Man. R. 342; *R.* v. *Grannis* (1887) 5 Man. R. 153; *R.* v. *Rodwell* (1884) 5 Ont. R. 186.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., TOWNSHEND, MEAGHER AND HENRY, JJ.

THE QUEEN v. BIGELOW.

Liquor license—Statutory restriction of certiorari proceedings —Affidavit negativing guilt—Jurisdiction of magistrate— Sale of liquor by wholesale.

1. The Liquor License Act of Nova Scotia, 1895, sec. 117, applies to prohibit the granting of a certiorari in respect of *any* conviction thereunder, unless the applicant makes an affidavit negativing the charge as laid in the information; and without such affidavit, the Court cannot grant the writ, although the sole questions raised are as to the validity of the License Act as regards wholesale transactions, and as to whether the conviction which showed the exact quantity of liquor admittedly sold was not a wholesale transaction.

ARGUED: November 21, 1898.
DECIDED: January 14, 1899.

Appeal from the order of RITCHIE, J., at Chambers for the issue of a certiorari to remove into this Court a conviction for a violation of the "Liquor License Act of 1895."

The Nova Scotia Liquor License Act, 1895, cap. 2, s. 117, enacts that—

"In no case instituted for breach of the Liquor License Act, 1886, or any amending Act, or this Act, shall a writ of certiorari issue, unless the party applying therefor shall make an affidavit that he did not by himself or his agent, or clerk, with his knowledge and consent, sell the liquor contrary to law, as charged in the information, or commit the offence charged in the information, as the case may be. Such affidavit shall negative the charge in the terms used in the information, and shall, further, negative the commission of the offence by the agent or clerk of the person accused or convicted with his knowledge or consent."

Defendant was convicted of having sold without license, contrary to the statute, a quantity of liquors which were adjudged to be intoxicating within the meaning of the Act.

The facts were admitted, but it was contended that it was

a wholesale transaction, and that so much of the provisions of the statute as professed to deal with wholesale transactions was ultra vires.

HALIFAX, November 21, 1898.

F. T. Congdon, for the appeal. The affidavit required by N.S. Acts, 1895, c. 2, s. 117, is necessary when the certiorari is on the ground of want of jurisdiction. *Queen* v. *McKenzie*, 23 N.S.R. 6; *Queen* v. *Conrod*, 24 N.S.R. 59; *Queen* v. *McDonald*, 26 N.S.R. 402; *Queen* v. *Power*, 28 N.S.R. 373; *Queen* v. *Grant*, 23 N.S.R. 416; *Queen* v. *Stevens*, 31 N.S.R. 125. The Legislature having taken away certiorari in all cases where the magistrate had jurisdiction, the section of the Act requiring the affidavit would be meaningless unless the affidavit is required where the magistrate has not jurisdiction. This is a conviction for a violation of the retail provisions of the Act. Neither under municipal institutions nor under the provisions as to licenses can the local Legislature prohibit or regulate the sale of liquor, except for the raising of revenue. *Atty.-General of Ontario* v. *Atty.-General of Canada* (1896) App. Cas. 348; *Brewers' and Malsters' Association of Ontario* v. *Atty.-General of Ontario* (1897) App. Cas. 231. The right of the Dominion to prohibit is now put on the general words at the beginning of s. 91 of the B.N.A. Act, and they get it there only so far as it is of a national character, and the local Legislature have the right where it is of a local and private nature. 32 Can. Law Jour. (1896) p. 430. In *Queen* v. *McDougall*, 22 N.S.R. 462, the grounds upon which the judges who decided adversely to the Act went have been wiped out by the decision of the Privy Council.

W. B. A. Ritchie, Q.C., contra.—The affidavit is not in any case required where there is a defect in the jurisdiction, and it is not in any event required where the Act upon which proceedings were taken is ultra vires.

[MCDONALD, C.J.—But how are you going to have an adjudication as to ultra vires without the affidavit?]

Where the charge is for selling liquor by wholesale, there

is no charge of a breach of the Liquor License Act, which contains no provisions against selling by wholesale — that is, no provisions which are intra vires—and, therefore, the provisions of the Act as to the affidavit do not apply to that offence. The affidavit is not necessary until it is shown that the prosecution was instituted for a breach of the Liquor License Act. *Tupper* v. *Murphy* (1882) 3 R. & G., 173; *Queen* v. *King*, 25 N.S.R. The affidavit is not required in any case where there is no jurisdiction over the subject matter. In reading s. 117 it must be borne in mind that provisions which oust the jurisdiction of superior courts to remove by certiorari the convictions of an inferior court have been confined by construction to cases where the inferior court has jurisdiction. *Queen* v. *Cheltenham*, 1 Q.B. 467; *Ex parte Brodall*, 3 Q.B.D. 509; 1 Chitty's Stat., p. 461; Paley on Convictions, p. 430. Section 117 only applies where the magistrate had jurisdiction over the subject matter, but had no right to make the particular conviction. The office of s. 118, s-s. 12 is to take away certiorari where the magistrate had jurisdiction to make the particular conviction which he did make. By s. 118 itself, s-s. 12 is limited to appeals. *Queen* v. *McKenzie*, 23 N.S.R. 28, is a decision that the affidavit is not required. The objection as to absence of affidavit was not taken below and is not open here. The wholesale provisions of the Act are ultra vires. An absolutely general regulation of the sale of liquor would be ultra vires the local legislature, which can only regulate the liquor traffic in so far as it is a local matter; and where the local legislature has passed such a general Act, it cannot be said that, as to certain sales it is ultra vires, although, as to others, it is intra vires. The sale here is not such a sale as is a purely local matter. The business in which this matter arose, namely, the importation, bottling, and selling of liquor, is not a matter of a local nature.

[MEAGHER, J.—But is not the sale of it by a party in the province to another party in the province a local matter?]

There can be no conviction in any case unless it is made to appear that the sale for which the conviction was made is

a purely local matter. 32 Can. Law Jour., p. 491 ; *Brewers' and Malsters' Association of Ontario* v. *Att'y General of Ontario* (1897) App. Cas., 231. Although the local legislature could require us to take out a license, they could not make regulations for our business, which is a wholesale business, and not of a local nature. A business which contemplates sale of liquor over the whole province is not of a local character. The conviction does not distinguish whether for wholesale or retail and is, therefore, bad. *Queen* v. *Adams*, 24 N.S.R. 59.

F. T. Congdon, in reply—It is conceded that there are certain cases in which the affidavit is necessary. The defendant, cannot, without the affidavit, attack this conviction on grounds in connection with which the affidavit is required. The result of the two provisions as to certiorari is that certiorari is taken away in all cases where there was jurisdiction ; then s. 17 comes in and can have no meaning except that the affidavit is necessary where there is no jurisdiction. It is a matter of evidence whether a sale by wholesale is of a local nature or not ; therefore, the question whether this conviction is good is a question of fact, and certiorari does not lie. The conviction need not negative the fact that the sale was a sale for use out of the province. On its face the Act is intra vires, and it would be a matter of evidence to show that it is not. The presumption is always in favor of the validity of the Act. 32 Can. Law Jour., p. 440. The fact that the conviction shows the exact quantity does not prove that the transaction was a wholesale one.

HALIFAX, January 14, 1899.

MEAGHER, J.—

The defendant was convicted by the stipendiary magistrate of Truro of the offence of having sold, without license, and contrary to the statute, a quantity of liquors, which were adjudged to have been intoxicating within the meaning of the Liquor License Act, 1895.

The facts were admitted upon the trial below, and it was contended that it was a wholesale transaction, and, therefore, it was not illegal, because so much of the provisions of the statute as professed to deal with wholesale transactions was ultra vires. No question, other than the alleged invalidity of the statute, was urged against the conviction.

Mr. Justice Ritchie, in chambers, granted an order for the issue of a certiorari, to remove the conviction into this court. The license inspector of Truro appealed against the order, and the case came before us thereon, and upon a motion to quash the conviction.

Mr. Congdon, for the appellant, contended that the order should not have been granted, because the affidavit required by s. 117 had not been made.

Section 117 is as follows :—

" In no case instituted for breach of the Liquor License Act, 1886, or any amending Act, or this Act, shall a writ of certiorari issue unless the party applying therefor shall make an affidavit that he did not by himself, or his agent or clerk with his knowledge and consent, sell the liquor contrary to law as charged in the information, or commit the offence charged in the information, as the case may be. Such affidavit shall negative the charge in the terms used in the information, and shall further negative the commission of the offence by the agent or clerk of the person accused or convicted, with his knowledge or consent."

Chapter 75 of the Revised Statutes, (4th Series), did not contain any provision taking certiorari away, nor restricting the granting, or issue, of writs of certiorari, except to require the applicant to give security by bond in a form which was prescribed. Section 9 of c. 1, of the Acts of 1876, in amendment of s. 25 of c. 75 above mentioned, provided that no appeal should be granted unless the appellant made an affidavit that he did not by himself, or his agent, sell the liquor contrary to law, as charged in the summons.

By chapter 12 of the Acts of 1876, in further amendment of chapter 75, the same provisions were enacted in regard to

a party applying for a certiorari—the words of the first part of the section were:—

"In no cause instituted for a breach of the license law for the sale of intoxicating liquors shall a writ of certiorari issue, unless, &c."

I shall, for the purposes of the present enquiry, assume that that section, and s. 117 of the present Act, are not materially different. *Tupper* v. *Murphy* (1882) 3 R. & G. 173, was the first case before the court in which that section came up for consideration. There was an affidavit in that case, and the contention was that it was not a compliance with the statute. Defendant's counsel contended that it was sufficient. Its terms are not disclosed, but the judges, though silent on that subject, appear to have regarded the case as if an affidavit had not been made.

Mr. Justice Rigby, who gave the principal judgment, said that a statutory clause taking certiorari away, must, in the light of the decisions, be understood to assume that the proceeding to be removed must be before a proper authority; and if the writ was available upon that ground, where the statute expressly prohibited it, a fortiori, it must be available in the case before the court, without the affidavit, where the proceeding was not before a competent court. I shall reserve my observations upon that case for the present.

McDonald v. *Ronan* (1886) 19 N.S.R. 25, was the next case on that subject before the court. One of the county court judges, on motion, had quashed a certiorari to remove a conviction, made under the Liquor License Act, upon two grounds, one of which was the absence of the statutory affidavit. The court dismissed the appeal, but gave no grounds. It seems to me altogether reasonable to say, both grounds having been argued, that if the court did not intend their decision to cover both grounds, they would have specified the ground on which they rested their decision.

The next case is *The Queen* v. *McKenzie* (1890) 23 N.S.R. 6, which, together with several other cases, was heard by four judges, viz., Weatherbe, Ritchie, and Townshend, JJ., and Graham, E.J. Much of the misapprehension which has

arisen as to that decision probably arose from merely regarding the result, or from the fact that it was not reported for a considerable time, and, consequently, was not always accessible, and memory, therefore, had to be depended on. I regard it as a decision contrary to what many supposed it determined as to the affidavit. Mr. Justice Weatherbe, in that case, said :—

"The Act, as amended, also, according to my view, though there is strong legal authority to the contrary, prevents anyone against whom the justice decides, however illegally, from removing the case, except upon an affidavit not only that he did not commit the offence alleged, but that he committed no like offence within 90 days."

Mr. Justice Ritchie was of the opinion that, where there was an absence of jurisdiction in the magistrate, the section requiring the affidavit did not apply, and regarded *Tupper* v. *Murphy* (1882) 3 R. & G. 173, as an authority for that view. That probably was the case Mr. Justice Weatherbe had in mind, when, in the quoted passage, he referred to the strong authority to the contrary. If so, it makes his opinion of the necessity for the affidavit all the more emphatic, and renders *The Queen* v. *McKenzie* (1890) 23 N.S.R. 6, as I have already said, an authority in favor of the necessity of an affidavit.

Mr. Justice Townshend and Graham, E.J., held that the certiorari could not issue unless the affidavit was made. Both of them gave convincing reasons to show that it was in cases where the magistrate had acted without jurisdiction that the affidavit was required, because certiorari under the statute was confined to these.

The next case is *The Queen* v. *Conrod* (1891) 24 N.S.R. 58. The only question open in that case for consideration by the court was as to the power of the commissioner to order the issue of a writ of certiorari. The absence of the affidavit was not raised upon the argument, and was not taken in the notice of motion. Mr. Justice Ritchie, in his opinion, states that the question he dealt with was the only one discussed. The learned Chief Justice alone, discussed, in his opinion, the affidavit question. It could not, however, properly be con-

sidered in that case, and he, probably inadvertently, overlooked that fact.

Apart from the expression of opinion of the learned Chief Justice, that case cannot be regarded as an authority upon the question in any aspect. The point was raised in *The Queen* v. *Ida Adams* (1892) 24 N.S.R. 559, but there is nothing to show that it was founded on fact and the court did not refer to it.

The question was again dealt with in *The Queen* v. *Malcolm McDonald* (1894) 26 N.S.R. 402. Mr. Justice Townshend and myself were of the opinion that the affidavit was an essential step to obtain the writ. Mr. Justice Graham, E.J., dissented on that branch, believing that *The Queen* v. *McKenzie* (1890) 23 N.S.R. 6, had decided otherwise, and that he was bound by it. I respectfully submit that he took an erroneous view of the case.

In *The Queen* v. *Power* (1896) 28 N.S.R. 373, known as the "Screen Law" case, Mr. Justice Townshend reiterated the view he expressed in *The Queen* v. *McKenzie*, but no other member of the court referred to the point, which was not raised, because counsel desired a decision as to the validity of the provisions affecting screens, and waived all technical objections accordingly.

In *The Queen* v. *Major* (1897) 29 N.S.R. 373, the subject was again incidentally referred to. That was a motion to quash the conviction after a return to the writ had been made. It was held that an objection because of the absence of such affidavit came too late. Mr. Justice Ritchie, however, remarked that he thought the question was decided adversely to the prosecutor by *The Queen* v. *McKenzie*. But, even upon his own view of the question, inasmuch as there was not an absence of jurisdiction in Major's case, the affidavit was necessary. Only four judges heard *The Queen* v. *McKenzie*. Two of them were very pronounced in the opinion that the affidavit was essential, and, assuming that Mr. Justice Weatherbe did not concur with them on that branch, still, in the result, the court would be equally divided, and

the case could not be regarded as an authority for either view.

I believe I have referred to all the cases where the question touching the need of an affidavit has been raised or discussed —at all events all the reported ones so far as I am aware— and I believe I am entirely justified in saying that, apart from *Tupper* v. *Murphy* (1882) 3 R. & G. 173, there is no decision which stands in the way of our exercising an independent judgment upon it. I hope to be able to distinguish that case successfully.

The rule of law is that, even where the writ of certiorari is taken away by the terms of a statute, the court nevertheless has power to award that process in cases where the objection to the conviction or proceeding of an inferior tribunal went to the jurisdiction. Such power is regarded as so beneficial to the subject that it is not allowed to be abridged by anything short of an express statutory prohibition. Paley on Convictions, 349.

The question, therefore, laying the case of *Tupper* v. *Murphy* aside for the moment, is reduced to one of construction. If the statute had said that no decision, or conviction of a justice, in any prosecution instituted for a breach of any of the provisions of the Liquor License Act, should be reviewable upon certiorari, it would, I take it, be clear that no effect could be given to a certiorari in the face of such a provision. See *Regina* v. *Ruyton*, 1 B. & S. 543, and *Regina* v. *Llangenny*, 4 B. & S. 310, which appear to me to establish that view.

The Liquor License Act contains numerous restrictions upon the power of this court to quash the proceedings of inferior tribunals, taken under that statute. Amongst others, s. 109 enacts, that no conviction or warrant for enforcing the same, or any other process or proceeding under the Act, shall be held insufficient or invalid by reason of variance, or the absence of an information, or by reason of any defect in form or substance, if it can be understood that it was made for an offence against some provision of the Act within the territorial

jurisdiction of the justice who made or signed it, and that the appropriate penalty, &c., was intended to be adjudged.

Section 118, sub-sec. 11, provides that no conviction shall be quashed for want of form, or be removed by certiorari into any superior court of record, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the party has been convicted, and there is a good and valid conviction to sustain the same, and sub-sec. 12 enacts that no conviction in respect of which there has been no appeal, shall be removed by way of certiorari into either the Supreme or County court, where the convicting magistrate had authority or jurisdiction to make such conviction. The statute contemplates that where such authority or jurisdiction did not exist, the writ of certiorari may issue, but subject always to the restriction imposed by sec. 117. The effect of the provisions in secs. 109 and 118, and other similar sections, is to deprive this court of the power to quash any conviction or other proceeding under that Act, excepting those just mentioned. Certiorari would therefore be useless in all other cases.

Somewhat similar provisions exist in the Canada Temperance Act, and were the subject of judicial review in *The Queen* v. *Rood* (1895) 28 N.S.R. 159. The limitations upon the power of the court, by virtue of the terms used in that statute, were pointed out there, and I need not repeat them. I may add, however, that the provisions of the Liquor License Act are even more restrictive than those of the Canada Temperance Act. The policy of the legislature was to restrict the issue of the writ to those cases alone, where the court, upon its return, having regard to the provisions of the statute, would have the power, if the facts warranted it, to quash the proceedings attacked upon the ground of want of jurisdiction in the tribunal which made or issued them.

When the legislature by express enactment took from the court the power to quash any proceeding under the Act, upon certiorari, or otherwise, except in a few specified instances, it cannot be that it intended the writ might nevertheless issue in the cases not excepted, although the arm of

the court was so shortened that it could not, in those cases, make the slightest use of the weapon of certiorari.

It was, therefore, in relation to writs of certiorari which could be made available to secure the quashing of convictions, or other proceedings, because of the want of jurisdiction in the officer or tribunal making them, that s. 117 was enacted. It would be altogether unjust to impose the burden of making the affidavit upon an applicant for a certiorari in a case in which the writ could not aid him in the slightest degree when he got it.

Sub-section 12, adverted to already, apparently created another condition precedent to the issue of a certiorari, except in cases where there was an absence of jurisdiction in the magistrate below, by providing that no certiorari shall issue where there has not been an appeal. This is a legislative affirmation of a well known principle at common law. See the cases cited in *Queen* v. *Walsh* (1897) 29 N.S.R. at pp. 542-543, upon that point.

Section 117 was intended to operate, not in the sense of abolishing the writ, but merely as a restriction upon its issue. Its effect is to disable the court, or judge, from granting the writ in any case unless the condition precedent, or restriction which it creates, has been complied with. In other words it prescribes a mode of procedure merely.

If due weight is given to the restrictive provisions in the statute, it will be found that secs. 109 and 117, and sub-sec. 12 of s. 118, go much further in the direction of abridging the power of the court, or a judge, than a provision which merely took away the writ.

The latter provision, by reason of decided cases, and the principles involved in them, founded upon the beneficial nature of the writ, has always been construed, as I have shown, in a limited sense, and so as not to deprive the court of the power to supervise and quash the acts of inferior tribunals in cases where they proceeded without jurisdiction.

But upon what reason or theory can we hold, where the legislature has clearly imposed a restriction, in relation to

procedure alone, upon the granting of a certiorari, that it must be limited to a certain class of cases?

It would not, I apprehend, be in any sense proper to regard s. 117, as operating in any degree the same as a section taking away the writ; and, if not, the same rule of construction would be inapplicable.

Moreover, in none of the cases which I have examined, where the question was whether the writ was taken away, were there provisions in the statute corresponding in any degree with those of s. 109, and other like sections of the Act in question. The writ, it is true, was in terms taken away, but the power of the court to quash in respect to matters of substance—or to enquire into the regularity of any part of the proceedings—was not limited, as this Act limits the powers of this court. The power to quash, in the cases referred to, was left, as to these matters, untouched, and was only abridged as to matters of form alone.

If, in lieu of this section, which requires a certain form of affidavit to be made, there was one which said that no certiorari should issue, until a bond was given in a prescribed form, and with a certain number of sureties, to respond the judgment to be given, I cannot perceive, upon any legal principle known to me, nor upon any process of reasoning within reach of my mind, how it could properly be said that it should be limited by construction so as to be held not applicable in cases where the proceeding to be removed was without jurisdiction.

There is nothing in the Liquor License Act to indicate in the smallest degree that the legislature intended that it should be regarded in the limited sense suggested.

If, in relation to matters of practice, we are at liberty to disregard the terms of this very plain enactment, I do not know of any limit upon our power in this respect. We would become, in fact, the legislature, and not merely the exponents of its mandates, if we ignored this provision of the statute.

The English cases I have consulted seem clearly to require that rules restricting the issue of writs of certiorari

should be construed narrowly, and that the applicants should be kept to strict observance of them.

The contention made in this case, if successful, would mean the adoption of a rule the opposite of that applied by the English courts.

The Queen v. *Wells* (1896) 28 N.S.R. 547, and the cases cited in the judgments therein, are much in point in this connection.

If s. 117 can be ignored or disregarded for the reasons suggested, equally so can section 31 of the Crown Rules, and, therefore, upon an application for the writ, in a case where the proceeding below was, or was suggested to be, without jurisdiction, a verified copy of the conviction or order sought to be removed need not be produced.

With respect to *Tupper* v. *Murphy* (1882) 3 R. & G. 173, I desire to say :—

1st. That none of the provisions to be found in secs. 109, 118, and the other sections of the present Act, restricting the issue and the scope and operation of the writ of certiorari, were then in existence, and the writ was not taken away by any words in the statute then in force.

2nd. The section referring to the affidavit was regarded as if it was the equivalent of a provision which merely took the writ away. In my opinion there was error in that view.

3rd. The distinction I have pointed out, in regard to the different rule of construction applicable to a provision which imposed a restriction upon the issue of the writ and prescribed a new mode of procedure to obtain it, and one which merely took it away, was not brought to the attention of the court.

4th. At all events there was no express provision then, as there is now, abolishing the writ in all cases except those specially designated. Furthermore, as the writ can only be issued and be effective in those cases which have been designated, we must, to give any efficacy to s. 117, hold that it was enacted with special reference to that class at least, and in it are included cases where the proceeding below was without jurisdiction.

If I am right in regarding the statutory provisions now in force as materially different from those existing when *Tupper* v. *Murphy* was decided, that in itself affords a very conclusive answer to Mr. Ritchie's contention that the re-enactment of the section prescribing the affidavit, after that decision was pronounced, was an adoption of the construction which the court in that case put upon it.

The only excuse I can offer for dealing at such length with the question of the affidavit is the fact that the question has been often raised, and a good deal of uncertainty seemed to exist with respect to what had or had not been decided by this court.

Since writing the foregoing I have found the case of *Regina* v. *Chantrell*, L.R. 10 Q.B. 587. It is, it seems to me, directly in point in support of the construction I have adopted. The court—Blackburn and Field, JJ.—quashed the certiorari in that case. The section they were called on to construe was s. 27 of 12 and 13 Vict., c. 92, and was in these words:—

"No conviction under the authority of this Act, or any order, judgment, or proceeding, relative thereto, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record."

They held that this provision precluded the issuing of a certiorari even for the purpose of bringing up a case stated by justices in quarter sessions, for the opinion of the court.

In further support of my views, I may refer to *Rex* v. *Fell*, 1 B. & Ad. 380 and the case next succeeding it at p. 382 of the same report. The provisions there were far less strong than those in the Act before us.

The appeal will be allowed, the order in chambers discharged, and the application for the writ dismissed.

We have not thought it necessary, under the circumstances, to deal with the question of the validity of the provisions of the Liquor License Act, 1895, which were attacked.

McDONALD, C.J.—

I am of opinion that this application must fail, because

the affidavit required by s. 117 of the License Act was not made.

The intention of the legislature, in requiring this affidavit to be made, appears to me very plain. Provision is made by the statute for the correction of any error either of law or fact, by the justices, on the trial of the cause or in the conviction, by an appeal to the county court, with the power of review to this court of the decision of the county court judge.

Having thus provided for the most ample protection of the interests of the party prosecuted, it appears to me perfectly reasonable that the party should be confined to the remedy provided by the Act, unless he is able to absolve himself of the offence charged, in the manner prescribed by s. 117; at any rate, the words of the section are so positive and unambiguous as to make it impossible, in my view, to hold that in any case under the Act, certiorari can issue in the absence of the required affidavit.

TOWNSHEND, J.—

I concur in the judgment of Mr. Justice Meagher. I have so often expressed my opinion on this matter, that I think it unnecessary to repeat what I have said.

HENRY, J.—

I have always been of the opinion that the affidavit is necessary, but I refrain from saying anything as to the policy of the legislature in making such a provision.

Appeal allowed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE GALT, C.J., C.P., ROSE AND MACMAHON, JJ.

THE QUEEN v. ROBINET.

Certiorari—Recognisance—Sufficiency of surety—Affidavit of justification, form of—Cr. Code 892.

1. In Ontario a surety upon a recognizance filed on a motion to quash a summary conviction, must justify in the sum of $100 over and above any amount for which he may be surety as well as over and above his debts.
2. A rule of Court passed before the enactment of the Code under the section of the Summary Convictions Act (Can.) now incorporated in the Criminal Code as sec. 892 as to recognizances on motions to quash convictions remains in force as a rule under the Code without being re-passed.

ARGUED: December 9, 1893.

DECIDED: February 5, 1894.

Motion *ex parte* for a rule nisi to quash a summary conviction.

Section 892 of the Criminal Code, 1892, is as follows:

892. The court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice and brought before such court by certiorari, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made, or before a judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of certiorari at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the

court where such conviction, order or proceeding is affirmed. R.S.C., c. 178, s. 90.

On November 17th, 1886, the High Court of Justice of Ontario passed the following General Order under the authority of sec. 6 of 49 Vic. (Can.) c. 49, [R.S.C., 1886, c. 178, s. 90, which on the codification of the criminal law was re-enacted as sec. 892 of the Criminal Code, 1892]:—

"Whereas, by the Act passed in the 49th year of Her Majesty's reign, chaptered 49, and intituled, "An Act to make further provision respecting summary proceedings before Justices and other Magistrates," it is enacted as follows:—

SEC. 8.—The second section of the Imperial Act, passed in the fifth year of the reign of His Majesty King George II., and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a Justice of the Peace in Canada, but the sixth section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under this Act, as might be had for enforcing the condition of a recognizance taken under the said Imperial Act."

"It is therefore ordered, under the authority of the said section, and in pursuance of the terms of the sixth section of the said Act, that no motion shall be entertained by this Court, or by any Division of the same, or by any Judge of a Division sitting for the Court, or in Chambers, to quash a conviction, order, or other proceeding which has been made by or before a Justice of the Peace [as defined by the said Act] and brought before the Court by certiorari, unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a Justice or Justices of the County, or place, within which such conviction or order has been made, or before a Judge of the County Court of the said County, or before a Judge of the Superior Court, and which recognizance with an affidavit of the due execution thereof, shall be filed with the Registrar of the Court in which such motion is made or is pending, or

unless the defendant is shown to have made a deposit of the like sum of $100 with the Registrar of the Court in which such motion is made, with or upon the condition that he will prosecute such certiorari at his own costs and charges and without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the Court in case such conviction, order or proceeding is affirmed."

Aylesworth, Q.C., for the motion.

TORONTO, February 5, 1894.

ROSE, J.—

The affidavit of the sureties is not sufficient in form according to the established practice. It neither negatives the fact of the deponents being sureties in any other matter, nor does it state that the sureties are worth $100 over and above any amount for which they may be liable as sureties.

Mr. Aylesworth raised the question of the necessity of passing a new Rule under sec. 892 of the Code. This is not necessary as the old rule remains in force. See the Interpretation Act, R.S.C., c. 1, sec. 7, s.s. 50.

The case is one in which an order nisi should go, but, under the statute and the rule, the motion cannot be entertained until a recognizance with sufficient sureties has been entered into. It must therefore be refused.

GALT, C.J., and MACMAHON, J., concurred.

Order refused.

Note: See the next case, *The Queen* v. *Ashcroft*, (N.W.T. 1899).

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

SOUTHERN ALBERTA JUDICIAL DISTRICT.

BEFORE ROULEAU, J.

THE QUEEN v. ASHCROFT.

Certiorari — Recognizance — Sufficiency of justification by sureties—Appeal taking away right to certiorari—Cr. Code 801, 892.

1. An affidavit of justification upon a recognizance given pursuant to Rule of Court passed under sec. 892 of the Criminal Code, need not state that the surety is worth the amount of the penalty over and above other sums for which he is surety.
2. A rule made under sec. 892 of the Criminal Code requiring sufficient sureties for a specific amount is complied with if the sureties justify as being possessed of property of that value and swear that they are worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. (*R.* v. *Robinet,* ante p. 382 not followed.)
3. The mere filing of a recognizance by the defendant for an appeal from a summary conviction does not deprive him of his right to a writ of certiorari for the purpose of having the conviction quashed for want of jurisdiction.
4. If a conviction has been filed by the magistrate under sec. 801 of the Criminal Code, in a court of superior criminal jurisdiction, a motion may be made to quash the same without the necessity of a writ of certiorari.
5. Section 892 of the Criminal Code authorizes the requiring of a recognizance only where the conviction is brought before the court by a writ of certiorari, and no recognizance is required where such a writ is not necessary or is dispensed with.

On the return of the rule nisi for a writ of certiorari, and to quash the conviction, it appeared that the conviction and all proceedings had been filed in court by the magistrate under section 801 of the Criminal Code, and among the proceedings returned was a recognizance filed by the defendant to prosecute an appeal from the conviction in question, also a recognizance filed on the present application. In the latter each of the sureties swore "That he was possessed of property of the value of $200 over and above all his just debts and liabilities, and over all exemptions allowed by law."

Counsel for the magistrate took the preliminary objections:

(1) That the sureties did not swear they were worth $200 over any other liability as sureties, citing *Regina* v. *Robinet*, (1894), 16 Ont. Pr. 49.

(2) That the appeal bond having been produced was evidence of an appeal having been taken, and the right to certiorari was taken away. *Regina* v. *Lynch*, (1886), 12 Ont. R. 372.

CALGARY, N.W.T., January 6, 1899.

ROULEAU, J.—

Two preliminary objections were taken in this application:

1. That the affidavit of justification in the recognizance is bad, because the party does not swear that he is worth two hundred dollars above all liability as a surety.

2. That the defendant had entered into recognizance before, to prosecute an appeal before a judge without a jury, and therefore he has lost his right to the certiorari.

I am of the opinion that the first objection is bad, because the only duty imposed by law upon a surety is that he should show that he is worth the amount above all liabilities. In this case the two sureties swear that they are possessed of property of the value of two hundred dollars, and that they are worth two hundred dollars over and above all their just debts and *liabilities*, and over and above all exemptions allowed by law.

Regina v. *Robinet*, 16 Ont. Pr. 49 does not show what was the rule in Ontario as to sureties, nor how the affidavit was drawn. At all events, I am not prepared to go so far, as long as the sureties can swear to their sufficiency under Art. 892 of the Criminal Code.

The second objection is not tenable under the authorities. A party has always a right to a writ of certiorari on the ground of want of jurisdiction, no matter whether an appeal is pending or not.

Besides, I am of the opinion that no recognizance is necessary before a writ of certiorari is obtained; and if such a writ

is not necessary or is dispensed with, there is no reason why a recognizance should be filed. Art. 892 of the Criminal Code is too clear to be commented on. It is sufficient for any one in reading it to see that a recognizance is only necessary when a writ issues, because it is made under the condition of prosecuting 'the said writ.'

Preliminary objections dismissed.

McCarthy, Q.C., for the magistrate.
Muir, Q.C , for defendant.

Note : See the report of the preceding case *The Queen* v. *Robinet* (Ont.), where the Ontario rule of Court as to recognizances under Cr. Code 892 is set forth.

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE OUIMET, J.

THE QUEEN v. GRAHAM.

Manslaughter—Aiding and abetting—Coroner not a 'justice' —Depositions of witness at Coroner's inquest—Witness absent from Canada—Admissibility at trial —Necessity of verbatim record of evidence—Cr. Code 61, 687.

1. A coroner is not 'a justice' within the meaning of Cr. Code 687 which provides for using upon a trial the depositions 'taken by a justice in the preliminary or other investigation of any charge,' of a witness absent from Canada.
2. A deposition to be admissible under Cr. Code 687 must be a *verbatim* record of the witness' evidence.
3. The evidence of a constable searching for a witness to serve him with a subpœna for the trial, that he had been informed by a person named that the witness was absent from Canada, is not sufficient evidence of such absence to render the witness' deposition admissible under Cr. Code 687.
4. Aid rendered to the principal offenders after the commission of the crime is alone insufficient to justify the conviction of the person so aiding, as a principal under Cr. Code 61.

MONTREAL, September, 1898.

The prisoner was being tried on an indictment for manslaughter.

The Crown brought evidence to prove that one John Burke, heard at the coroner's inquest, had now left the country, and the constable, who was to serve him with a subpœna, deposed that he was so told by a man whose name he gave, but who was not brought up to testify.

The coroner of the district testified that, at an inquest held on the body of the deceased, he had taken the evidence of one John Burke, and had reduced to writing as much of it as was material. Burke's evidence was given in the English language and the abstract made was in French. The accused was present, but did not cross-examine the witness. The

fact was not mentioned in the deposition itself, and the coroner said that he had no special recollection of it, but as it was his practice, he felt sure that he gave the accused full opportunity of cross-examining the witness. The abstract was certified by the coroner, but it had not been read to the witness nor signed by him.

The Crown now applied to file the deposition of Burke, and have it read to the jury.

The Court gave the following decision:—First, the evidence of the constable, without producing the man himself who told him that Burke had left the country, was not sufficient in law to prove the absence of the witness, it being only secondary evidence, when it seemed that primary evidence was obtainable.

Secondly, the deposition offered was not a deposition within the meaning of art. 687 of the Criminal Code, such deposition not being a *verbatim* record of the witness's evidence, not having been read to nor signed by him, and it not being shown that the accused had been given an opportunity of cross-examination.

Third, a coroner is not a justice of the peace within the meaning of art. 687, and art. 3, § *n*, Criminal Code. 57 Vict. (Q.), ch. 26, s. 1, forbids coroners to act as justices of the peace in the cities of Montreal and Quebec.

The evidence did not show that the accused was present when the offence was committed, or that he had anything to do with it previously. He was only seen in the company of those who were proved to have committed the offence charged, and who were then taking the victim into a lane close by.

The Judge instructed the jury that, unless they found that the evidence disclosed that the accused had been acting with the perpetrators of the offence, giving them assistance and encouragement by his advice previous to, and his presence actual or constructive at, the commission of the crime, he should be acquitted. Aid rendered to the principal offenders after the commission of the crime could not justify a verdict of the offence charged.

The jury brought in a verdict of "Not guilty."

Cooke, Q.C., for the Crown.

Quinn, Q.C., for the prisoner.

Note: *Evidence—Depositions under Cr. Code 687.*

See the next case, *The Queen* v. *Hamilton* (Man. 1898.)

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE DUBUC, KILLAM AND BAIN, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. HAMILTON.

Depositions on preliminary inquiry, of witness since deceased—Admissibility at subsequent trial—Meaning of 'purports to be signed by the justice'—Caption of depositions—'Substantial wrong' at trial—Grounds for new trial—Cr. Code 590, 687, 746(f).

1. In order that sec. 687 of the Criminal Code should apply to make admissible as evidence at the trial the deposition of a witness, since deceased, taken on a preliminary inquiry or other investigation of a charge against the accused before a justice of the peace, the document containing the deposition is alone to be looked at to ascertain if the deposition "purports to be signed by the justice," as is required by that section.

2. Where the deposition sought to be used had been signed by both the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," or the date when taken, or any record by the magistrate certifying that such added deposition had been *taken by* him, and the first depositions formed in themselves a complete document concluding with the magistrate's note of the remand of the case, it is not to be presumed that the informal deposition following the formal document is a continuation of the first deposition (in which appeared no reference to the added deposition), or that it relates to the same charge, and it was held that such added deposition did not "purport to be signed by the justice by or before whom the same purports to have been taken." (Cr. Code 687.)

3. A deposition, the caption of which sets out the name of the justice and describes him as one of the justices of the peace for a named county, "purports to be signed by the justice by or before whom the same purports to have been taken," if the same is signed by the justice with his name only, without adding to it, as in form S of the

Code, the initials "J.P." and the name of the county for which he is a justice; and such a deposition is prima facie admissible in evidence. (Cr. Code 687.)

4. Where a deposition of a deceased witness taken on an inquiry before a magistrate has been improperly admitted in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. (Cr. Code 746.)

5. *Per Killam, J.*—The deposition of a deceased witness may be used in evidence apart from sec. 687, Cr. Code, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken," but, where it is not admissible by virtue of sec. 687, it must be affirmatively shown that all the formalities required to be observed in taking depositions (Cr. Code 590) have been complied with.

ARGUED: 6th December, 1898.
DECIDED: 23rd December, 1898.

Crown case reserved.

Prisoner was tried at the Assizes at Brandon, in November, 1898, before Bain, J., on an indictment, the first count of which charged that between the first day of November, 1892, and the first day of March, 1893, he unlawfully did use a certain steel instrument upon the person of one Martha Louise Walker with intent thereby to cause her miscarriage.

The indictment contained other counts charging the prisoner with having unlawfully administered to and caused to be taken by the said Martha Louise Walker certain noxious things with the like intent.

It was proved that Martha Louise Walker had died in the month of July, 1898, and the Crown applied to be allowed to read as evidence her depositions taken on the preliminary investigation of the charges against the prisoner before the magistrate who committed him for trial, Mr. Kenneth Campbell, Police Magistrate at Brandon.

Mr. Campbell was called as a witness, and it appeared from his evidence that the prisoner had been brought before him on two informations, one charging him with having unlawfully administered certain noxious things to Martha Louise Walker with the intent to cause her miscarriage, and the other, with having used a certain instrument upon her with the like intent; that the said Martha Louise Walker

was examined before him as a witness for the prosecution on both charges; that her depositions were taken in the presence of the accused; and that he and his counsel had a full opportunity of cross-examining the witness. The deposition of the witness on the charge of unlawfully administering, etc., was contained in the file marked Exhibit 1 at the trial, and her deposition on the charge of using an instrument was in the file marked Exhibit 2 at the trial.

On behalf of the prisoner objections were taken to the admission of the two depositions of Martha Louise Walker on the following grounds:

"As to the deposition contained in Exhibit 1—1st, That the document is not in the form of a deposition as provided by section 590 of the Criminal Code; 2nd, There is no signature of a justice in such form as to show that the signature is meant to authenticate the deposition; 3rd, There is nothing to show that, if the justice did sign, the witness was present at the time of the signing by him; 4th, The deposition does not purport to be signed by the Justice of the Peace by or before whom the same purports to have been taken; 5th, The document purports to be the evidence of Martha Louise Walker, but there is nothing to show upon what charge it was taken; 6th, It purports to be the evidence of Martha Louise Walker, but it is signed only 'Louise Walker.'"

"As to the deposition contained in Exhibit 2—1st, The caption of this document is incomplete and it is not a finished document. It does not show where this Martha Louise Walker is from, and there is nothing to show that she is the one upon whom the crime was committed; 2nd, The signature is of Louise Walker only, and not of Martha Louise Walker. The deposition is not in the form prescribed by the statute, and has not the certificate at the end of it required by Schedule form S of the Code, and is not in the form of a deposition; 3rd, The alleged deposition is not signed by the magistrate in such a form as to show that his signature is meant to authenticate the deposition; 4th, There is nothing to show that the magistrate and witness were

together when each signed the deposition ; 5th, The deposition does not purport to be signed by the Justice by or before whom the same purports to have been taken."

Bain, J., allowed both the depositions to be read as evidence in the prosecution, but reserved the question of their admissibility for the opinion of the Court.

The prisoner was convicted on the count in the indictment charging him with having unlawfully used an instrument with the intent to procure the miscarriage of the said Martha Louise Walker, and he was acquitted on the other counts.

Sentence was postponed until the Court had decided whether the depositions were admissible as evidence, and the prisoner was admitted to bail.

Apart from these depositions, there was no evidence adduced by the Crown on which the prisoner could have been convicted.

The paper, Exhibit 2, it was claimed, contained the evidence taken upon the charge on which the prisoner was convicted. It had the heading "Canada, Province of Manitoba, Western Judicial District," and then began "The depositions of Martha Louisa Walker and of taken on," etc., "at Brandon in the Western Judicial District aforesaid, before the undersigned, one of Her Majesty's Justices of the Peace for the said Province in the presence and hearing of Alexander Hamilton, who stands charged," etc. After her statement, there were what appeared to be the signatures "K. Campbell" and "Louisa Walker."

The other paper, Exhibit 1, had the same heading as Exhibit 2, and then began, "The depositions of Matthew Hamilton, of Municipality of Rossburn and"; then followed a word which might be "other" or "others"; and then "of taken on the 25th of March," etc., "at Brandon," etc. (proceeding as in the other, except in setting out a charge of a different offence). After what appeared to be Matthew Hamilton's deposition, with the signatures "K. Campbell" and "M. A. Hamilton," the document proceeded "Florentine Hamilton, sworn, saith," followed by what

appeared to be her evidence and the signatures "K. Campbell," "Florentine Hamilton." Then there was a note as to certain evidence previously taken being read by consent, followed by the statement "Prisoner is remanded until Tuesday, March 29th, at 10.30," with the date "March 25th, 1898," and the signature "K. Campbell."

Up to this point three sheets of paper had been used, to which were annexed twenty-two other sheets written on and one partly written and partly printed on, the latter being in the usual form for a prisoner's statement and the preliminary formalities.

The first of these annexed sheets began "Martha Louise Walker, sworn, saith," which was followed by what appeared to be her evidence, occupying eighteen sheets of paper, and signed on the eighteenth, "K. Campbell, P.M." and "Louisa Walker." The next page, numbered 24, began "Martha Louise Walker, re-called, saith," following which was a note as to objections and rulings upon them, and what appeared to be some further evidence, occupying two sheets, with signatures as before.

The Criminal Code, 1892, provides as follows:

"590. When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

"2. The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

"3. The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in the form S in schedule one hereto, or to the like effect.

"4. Such deposition shall, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice, the accused, the witness and justice being all present together at the time of such reading and signing.

"5. The signature of the justice may either be at the end

of the deposition of each witness, or at the end of several or of all the depositions in such a form as to show that the signature is meant to authenticate each separate deposition."

Form S in the schedule to the Code gives forms of caption for the depositions of one or of several witnesses, and concludes with a direction as follows :

"(*The signature of the justice may be appended as follows :*)

"The depositions of X., Y., Z., etc., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D. and signed by the said X., Y., Z., respectively in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

"J. S.,

"*J. P.*, (*Name of county.*)"

Sections 687 and 688 relate to the reading of depositions taken before a Justice as evidence at the trial :—

"687. If upon the trial of any accused person it is proved upon the oath or affirmation of any credible witness that any person whose deposition has been taken by a justice in the preliminary or other investigation of any charge is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is also proved that such deposition was taken in the presence of the person accused, and that he, his counsel or solicitor, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such deposition was not in fact signed by the justice purporting to have signed the same.

"688. Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the

prosecution of the offence with which such person was charged when such depositions were taken."

H. M. Howell, Q.C., for the prisoner. The indictment covered two acts, and for each there was a separate charge before the magistrate. Down to 1 and 2 Ph. & M., c. 13, there was no investigation by a J. P. This was extended by 2 and 3 Ph. & M., c. 10. Depositions appear to have been received in evidence after that Act: *Rex* v. *Smith*, 2 Stark, 210 *n*. The next legislation after 7 Geo. IV. apparently was 11 and 12 Vic., c. 42, which allowed depositions to be put in evidence. The Dominion Act respecting the duties of Justices of the Peace in relation to persons charged with indictable offences, 32 and 33 Vic., c. 30, ss. 29, 30 (Can. 1869), applied the same principles as to formalities as in 2 and 3 Ph. & M., c. 10. The form of certificate does not say the depositions were taken in the presence of the accused. Under that Act there had to be (1) Presence of accused; (2) Form M.; (3) Witnesses to sign in the presence of the magistrate; (4) An oath. To authorize the reading of the depositions they must have been taken "as aforesaid," which means the formalities set out had been complied with. The conditions of illness and absence are new. The Act requires that the depositions "purport" to be signed by the magistrate. This was changed in R.S.C., c. 174, s. 69. The words "as aforesaid" are omitted in the Code, but it must refer only to depositions taken as required by the statute. See Criminal Code (1892), ss. 590, 687, 688. If depositions do not comply with the Act, they cannot be used: *Reg.* v. *Miller*, 4 Cox C.C. 166; *Reg.* v. *France*, 2 M. & Rob. 208; *Reg.* v. *Watts*, L. & C. 339; *Reg.* v. *Newton*, 1 F. & F. 641; *Reg.* v. *Langridge*, 2 C. & K. 975; *Reg.* v. *Johnson*, 2 C. & K. 354. In *Reg.* v. *Mullen*, 9 Cox C.C. 339, the deposition was received because the witness had in fact signed it. As to *Reg.* v. *Parker*, L.R. 1 C.C. 225, it only decided what were the necessary formalities. Exhibit 1 is not in the form of a deposition. There was no evidence that Martha Louisa Walker gave her evidence in the presence of the accused. There was nothing to show the prisoner was

present on March 29th. There was no evidence to show that the evidence of Martha Louisa Walker was read over to her. The magistrate stated he was not sure he signed in the presence of the witness. It was necessary for the magistrate to sign so that the witness could see him do so, and the evidence showed she could not. It does not purport to be signed by the magistrate. Before the Criminal Code, s. 590, s-s. 5, this was not required. There was no proof that the depositions contained what the witness said. The depositions do not show they were given under oath.

W. E. Perdue for the Crown. The formalities of the Act are not absolutely required. The Imperial Act, 11 and 12 Vic., c. 42, s. 17, is similar to the Dominion statute, 32 and 33 Vic., c. 30, s. 30. The wording is changed in the Code, s. 687; the words "has been taken as aforesaid" being left out. The change of language must be deemed to show a change of intention on the part of the Legislature: Maxwell on Statutes, 3rd ed. 449; *Rex* v. *Great Bolton*, 8 B. & C. 71; *Ricket* v. *Met. Ry. Co.*, L.R. 2 H.L. 207. The words "preliminary or other investigations" are new. If, therefore, the provisions of section 687 have been complied with, it is not necessary that the deposition should strictly follow the form S in schedule, and need not comply with section 590. A caption is not necessary. Evidence may be given to explain a signature. The provisions of section 490 are directory only, and deviation therefrom does not vitiate the proceeding. See Interpretation Act, R.S.C., c. 1, s. 7, s-s. 44. There is no doubt the witness was sworn and the evidence given on oath. The caption and signature by the magistrate are sufficient: *Reg.* v. *Lee*, 4 F. & F. 63; *Reg.* v. *Langridge*, 18 L.J.M.C. 198. All the forms in the schedule to the Code show that the addition of the letters J.P. after the magistrate's name is all that is required to indicate his office, but the omission of those letters does not vitiate the document: *Ex parte Johnson*, 26 Ch. D. 338; *Eddowes* v. *Argentine Loan Co.*, 38 W.R. 629.

DUBUC, J.—The question to be determined in this reserved case is whether the two depositions of Martha Louise

Walker, now deceased, taken at the preliminary investigation before the magistrate, were admissible in evidence at the trial of the accused.

The objection is that the depositions were not taken according to the requirements of The Criminal Code. Subsection 3 of section 590 of the Code says that the evidence of each witness shall be taken down in writing in the form of a deposition, which may be in the Form S in schedule one or to the like effect.

The first deposition of Martha Louise Walker was taken on the 29th March, 1898. It is found attached to some other depositions with no special heading or caption to this particular deposition, except as follows: "Martha Louise Walker, sworn, saith." It is signed "Louisa Walker" and "K. Campbell, P.M." The letters "P.M." are supposed to stand for "Police Magistrate."

On the first page of the depositions, attached together, there is a caption stating the name of the first witness examined, the place, the date, the charge, and that it was taken in the presence of the accused. To comply with the Form S, it should have stated the names of the different witnesses to be examined at the same time, and that the depositions were taken "before the undersigned, a Justice of the Peace," etc.; and there should also have been, at the end of the depositions, a statement showing the names of the witnesses examined, stating that they were taken and signed in the presence and hearing of the accused, and that the magistrate also signed his name in the presence of the accused. At the end of the deposition of Matthew Hamilton, the first witness examined, are found the signatures of the said Matthew Hamilton, and of the magistrate K. Campbell, without any addition showing his title of Police Magistrate or Justice of the Peace. This is followed by the deposition of Florentine Hamilton, with no special heading, and closed with her signature and the bare signature of the magistrate.

The deposition of Matthew Hamilton is stated to be taken on the 25th March, 1898; and at the end of the

deposition of Florentine Hamilton, there is a note stating that the prisoner is remanded until the 29th March.

Then follows the deposition of Martha Louise Walker as above referred to. It is supposed to have been taken on the 29th March, 1898; but there is nothing in the deposition itself, or in other papers attached, to show that it was taken on that day, or that the charge was read to her, or that the prisoner was present.

At the trial, the magistrate was examined and stated that the deposition was taken on or after the 29th March, that the prisoner was present and cross-examined the witness by his counsel, that it was signed in his presence and in the presence of the prisoner.

In *Reg.* v. *Miller*, 4 Cox C.C. 166, it was held that the deposition of a witness absent from illness, to be admissible under the statute 11 and 12 Vic., c. 42, s. 17, must be regular and appear to have been regularly taken upon the face thereof, and cannot be proved by extraneous evidence to have been properly taken in fact.

In *Reg.* v. *Newton*, 1 F. & F. 641, the deposition of the deceased had been taken before a magistrate in the presence of the accused, and was afterwards attached, without a separate caption, to the depositions of other witnesses taken before a different magistrate. It was held that the deposition of the deceased, having no caption showing on what charge it was taken, was inadmissible in evidence; nor was it admissible as a dying declaration, as it did not relate to the offence which caused the death.

In the present case, the deposition of the deceased, taken by itself, shows no relation to the charge laid against the prisoner; and there is nothing in the caption of the first deposition nor at the end of all the depositions to show that the said deposition of the deceased, Martha Louise Walker, has any relation to the charge or to the other depositions. The bare fact that it is attached to the other depositions is not sufficient to show that it relates to the same charge, or that it was taken in the same investigation. And it seems

to me that these deficiencies could not be cured by the parol testimony of the magistrate.

I am, therefore, of opinion that the said deposition was not receivable in evidence at the trial of the accused.

The second deposition of the deceased Martha Louise Walker, taken on the 30th March, stands alone and is not attached to any other paper. It was not taken on the specific charge on which the prisoner was convicted, but on another charge of the same purport and in connection with the same unlawful purpose; and a notable portion of the deposition bears on the said specific charge. This is allowable under section 688 of the Code. It was also held receivable under 11 and 12 Vic., c. 42, s. 17, in the case of *Reg.* v. *Lee*, 4 F. & F. 63, where the deposition had been taken on a charge of robbery, and was received on a charge of murder subsequently laid against the prisoner.

This second deposition has a caption which appears to contain the requirements of the Code according to Form S of the schedule. At the end, however, it is only signed "Louisa Walker" and "K. Campbell," without any addition as to his title as magistrate.

It is objected that, in the heading, the deposition is stated to be that of "Martha Louise Walker," and it is signed "Louisa Walker" only. But it is sufficiently shown that it was the same person who was described as Martha Louise Walker who signed the deposition as "Louisa Walker." That was evidently her ordinary signature. She might have signed with the initials only of her Christian names, and it would have been valid as her signature.

The principal objection to this deposition is that the magistrate signed his name only, without adding to it, as in Form S, "J.P." and the name of the county for which he was Justice of the Peace.

It is no doubt an omission; but is it of such a character as to vitiate the deposition and render it inadmissible in evidence? I do not think so.

In *Rex* v. *Flemming & Windham*, 2 Leach C.C. 996, it was

held that, on an indictment for rape, the deposition of the girl taken before the committing magistrate, and signed by him, may, after her death, be read in evidence at the trial of the prisoner, although it was not signed by her, and she was under twelve years of age, provided she was sworn and appeared competent to take an oath, and all the facts necessary to complete the crime may be collected from her testimony so given in evidence.

In *Reg.* v. *Lee*, 4 F. & F. 63, it was held that the deposition of the deceased was admissible, although that particular deposition, attached to some others, was not even signed by the magistrate.

Sub-section 4 of section 590 of the Code requires the deposition to be read over to and signed by the witness and the justice, the accused the witness and the justice being all present together at the time of such reading and signing. This has been proved by the evidence of the magistrate Campbell given at the trial to have been complied with.

This appears to be sufficient under section 687 of the Code, where it is stated that, if it is proved that such deposition was taken in the presence of the person accused, and that he, his counsel or his solicitor had a full opportunity of cross-examining the witness, then, if the deposition purports to be signed by the justice by or before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such deposition was not in fact signed by the justice purporting to have signed it.

In this case we have the signature of the magistrate Campbell at the end of the deposition, and he is shown to have put his signature there in his capacity of magistrate by referring to the caption, where it is stated that the deposition of Martha Louise Walker is taken "before the undersigned, one of Her Majesty's Justices of the Peace for the said Province." This is a sufficient compliance with the provision of section 687, which requires that the deposition, in order to be read in evidence, must purport to be signed by the justice by or before whom it purports to have been taken.

Here the deposition was signed, and purports to have been signed by the justice before whom it was taken.

At the end of Form S, there is a certificate or statement of the magistrate, which is not found at the end of this deposition; but this certificate or statement appears to be particularly applicable and required where more than one deposition is written on several sheets of paper, and the signature of the magistrate is only written on the last of those sheets of paper, under section 590, although it might be proper and advisable that such certificate and statement should be used also at the end of a single deposition, as perhaps it is intended that it should be.

In my opinion, this second deposition of Martha Louise Walker is taken in sufficient compliance with the requirements of the statute to be receivable in evidence; but, as the jury at the trial may have been influenced by the contents of the first deposition which was inadmissible, the conviction will have to be quashed, and the prisoner granted a new trial.

KILLAM, J.—

The only question for our consideration is whether the two sets of depositions referred to in the reserved case were properly authenticated or proved so as to be admissible in evidence.

There was evidence which, apparently, satisfied the learned Judge before whom the cause was tried that Martha Louise Walker, whose evidence had been given before a Justice of the Peace in the preliminary investigations of the charges contained in the first two counts of the indictment, was dead, and that her evidence had been given in the presence of the prisoner whose counsel had full opportunity of cross-examining the witness.

Her depositions were, therefore, admissible in evidence at the trial under section 687 of The Criminal Code, if they purported to be signed by the justice by or before whom they purported to have been taken. This is a question of the meaning of the document itself, unaided by extrinsic evidence.

And it must purport to show that the deposition was taken by or before a Justice of the Peace, as well as to bear his signature.

What would be the ordinary construction of a document, or any part of it, according to the customary mode of using language, I take to be its purport. I construe the words "Louisa Walker" at the end of Exhibit 2 as the signature of Martha Louisa Walker, the witness, and the other signature as that of the party referred to at the beginning as the undersigned. I think the document purports to be signed by the justice before whom the deposition purports to have been taken.

Certainly the purport is not so distinct as in Form S appended to The Criminal Code. The Act, however, does not make these forms obligatory, although, under section 982, they are sufficient, if used, and they may well assist in the construction of the Act. It does not appear to me necessary that there should be words of attestation, as "Witness my hand," or "In witness whereof I have hereunto signed my name." Nor do I think it necessary that the official character of the subscriber should be set out after the signature in words or letters. While the form annexed to the Code gives the initials "J.P." these did not appear in the forms in the older Canadian Acts, 32 & 33 Vic., c. 30, and R.S.C., c. 174.

There purports to be two signatures at the end of the document. The introductory part describes the deposition as taken before the undersigned, a Justice of the Peace for the Province. Taking the instrument as a whole its purport is that it bears the signature of the justice before whom this deposition thus purports to have been taken.

The defect in *Reg.* v. *Miller*, 4 Cox C. C. 166, was that the document did not show for what county the justice was appointed or in what county the deposition was taken. While the word "Kent" was at the top, it did not show that the County of Kent was meant, and the subsequent reference to the "said county" had no meaning. Here the document describes the justice as one for the Province, and speaks of

the deposition as taken in the "Western Judicial District aforesaid."

About the other document, Exhibit 1, there is more difficulty.

It does not appear to me that the twenty sheets comprising Exhibit 1 taken by themselves or through any apparent connection with what precedes or follows them, purport to contain depositions taken before a Justice of the Peace or to be signed by a Justice of the Peace. The heading, or caption as it is often called, on the first page of the whole document, purports to refer only to depositions taken on the 25th March. On the third sheet there is the note of a remand, and the natural construction of the document as a whole, having reference both to the order in which the sheets are arranged and to the numbers upon them, is that only the evidence upon the first three sheets was given on the 25th March.

Under these circumstances, it does not seem that the fastening of the sheets together can give a purport that the fourth and following sheets contain depositions taken before the same or another justice, or connect the signatures on pages 21 and 25 with the introductory matter on the first page, as in the case of Exhibit 2.

True, mere annexation of the sheets of paper may be sufficient in many cases to form a connected whole, as in *Reg.* v. *Johnson*, 2 C. & K. 354, and *Reg.* v. *Parker*, L. R. 1 C. C. 225, and I take it to be so in the case of Exhibit 2; but the continuity appears to be broken in Exhibit 1, to such an extent that there is not the relation between the first three and the remaining sheets which is necessary to give the requisite purport to the signatures on pages 21 and 25.

But while, for these reasons, it does not seem that section 687 of the Code authorized the reading of the deposition in Exhibit 1, there is the further question whether there is any other authority for reading them.

Preliminary investigations by Justices of the Peace and the examination of witnesses therein were authorized by the statutes, 1 & 2 Ph. & M., c. 13, 2 & 3 Ph. & M., c. 10, and

7 Geo. 4, c. 64; but none of these Acts contained any provision for using upon the trial the evidence thus taken. However, it soon became the practice, upon the principles of the common law, thus to use the evidence of a witness who had since died, when such evidence was shown to have been given in the presence of the accused, and that the latter had had an opportunity of cross-examining the witnees: See Archibald's Crim. Plead. and Evid., 21st ed. p. 293; *Rex* v. *Paine*, 1 Salk. 281 *n* (*b*); *Rex* v. *Smith*, 1 Stark. 209, *n*.

The method of proof was—at least, usually—by reading the depositions. See 2 Hawk. P.C., c. 46, §§ 17, 18, 21, 22, 27; *Rex* v. *Smith*, R. & R. 339; *Rex* v. *Wilshaw*, C. & Mar. 145. And it seems to have been considered that, where the statutes provided for the observance of certain formalities in and about the taking and authenticating of the depositions, compliance with these provisions should first be proved. See *Reg.* v. *France*, 2 M. & Rob. 207; *Reg.* v. *Johnson*, 2 C. & K. 354; *Reg.* v. *Flemming*, 2 Leach 996; *Reg.* v. *Watts*, L. & Cave, 339; *Reg.* v. *Wilshaw*, C. & Mar. 145; *Reg.* v. *Hendy*, 4 Cox C.C. 243.

The last mentioned case was tried about eighteen months after the Act, 11 & 12 Vic., c. 42, came into force, and yet—though for what reason the report does not show—the old method of proving the deposition was resorted to. Erle, C.J., expressly referred to the reading of the depositions to the witness and the signature of the magistrate as matters to be proved.

Section 590 of The Criminal Code requires that the deposition be read over to the witness and be signed by him and by the magistrate, all three, magistrate, witness and accused, being present together. While the signatures of witness and magistrate are proved, it is not shown that all were present when they were affixed; and while there was some general evidence that when depositions were taken they were read over to the witnesses, it does not appear to have been sufficiently proved that those in question were so.

Then, even if section 687 be considered not be cover the whole ground, and it be held that depositions not satisfying

that section upon their face may be read on proof of compliance with section 590, I am of opinion that such compliance was not shown in the present case, and that, upon no view, is it possible to uphold the reception of the deposition in Exhibit 1.

While these were taken upon a charge on which the accused was acquitted, they contained very material testimoney bearing on the charge on which he was convicted which may well have had great weight with the jury.

In my opinion, the conviction must be set aside and a new trial granted.

BAIN, J.—

At the trial I thought it doubtful if the depositions in question could be given in evidence against the prisoner; but, as the case for the Crown depended wholly on the evidence in these depositions, I thought it better to allow them to be read and to reserve the question of their admissibility for the opinion of the Court. The opinion I have now come to is that the deposition of the deceased girl, Martha Louise Walker, taken on the charge of unlawfully using an instrument, etc., marked Exhibit 2 on the trial, was admissible, and that her other deposition taken on the charge of unlawfully administering, etc., in the Exhibit marked 1 at the trial, was inadmissible.

It is a rule founded on common law principles that, if a witness be proved to be dead, secondary evidence of a statement he made under oath on a former trial between the same parties will be received, provided that the facts in issue are substantially the same, and that the person against whom the evidence is to be given had the right and opportunity of cross-examining the witness: *Reg.* v. *Smith*, 2 Stark. 208 and note; Taylor on Evidence, § 464.

At common law, justices of the peace had no authority to take examinations or depositions; and they were first authorized and directed to do so by the 1 & 2 Ph. & M., c. 13, and 2 & 3 Ph. & M., c. 10. These statutes made the taking of depositions a judicial act or proceeding; and so the

practice grew up, that, if a witness were dead or were kept out of the way by procurement of the prisoner, his deposition was allowed to be read in evidence at the trial, provided it had been properly taken: *Reg.* v. *Scaife*, 17 Q.B. 237, *per* Coleridge, J. Neither of these statutes, nor the 7 Geo. IV., c. 10, which amended and extended the provisions in question, expressly declared that depositions might be given in evidence; and until the 11 & 12 Vic., c. 42, their admissibility had no other sanction than the common law rule. But section 17 of this Act, after directing how depositions are to be taken by committing magistrates, provides that these depositions under certain circumstances may be received in evidence; and section 687 of The Criminal Code copies this part of the section with only a few immaterial alterations.

The application that was made at the trial to read these depositions was rested wholly on this section 687; but, as was pointed out in *Reg.* v. *Beeston*, Dears. C.C. 405, the object of the same provisions in the English Act was to extend rather than to limit the operation of the common law, and it may be that a deposition is still admissible apart from the section, just as it would have been before the Act was passed. If, however, advantage cannot be taken of the provisions of the section, which are intended to facilitate the admission of depositions, then it would be incumbent on whomsoever seeks to use the deposition to prove affirmatively that it had been properly taken, that is, in the present case, to prove that the directions of section 590 had been substantially complied with. But this was not done as regards one or two essential directions; and it is only necessary now to decide if the depositions were admissible under the section. The further question, whether, since the statute, the statement of a deceased witness at the preliminary examination can be proved in any other way than by the production of his deposition does not arise on the case reserved.

It was proved as regards both depositions that Martha Louise Walker is dead, and that they were both taken in the presence of the accused, and that his solicitor had a full opportunity of cross-examining the witness. And as to the

deposition in Exhibit 2, I think it can fairly be said that it purports to be signed by the justice by or before whom it purports to have been taken. On the face of the document it purports to be a deposition on oath of this girl taken on the charge against the accused, "before the undersigned one of Her Majesty's Justices of the Peace for the said Province." Then at the end of the deposition there is the signature "Louisa Walker," and beside it is another signature "K. Campbell." There are no words to show, as there should be, that the signature was meant to authenticate the deposition, but I think it would be unreasonable not to infer that "K. Campbell" is the signature of the person who is mentioned in the caption as the undersigned justice of the peace; and, if this inference be made, then the deposition purports to be signed by the justice by or before whom it purports to be taken, and it is *prima facie* admissible under section 687.

But the deposition in Exhibit 1 is in a very different position in this respect. At the beginning of the file of papers to which this deposition is attached there is the heading, "The deposition of Matthew Hamilton and others taken the 25th day of March, before the undersigned one of Her Majesty's Justices of the Peace," etc. Then follow the depositions of Matthew Hamilton and Florentine Hamilton, and at the end of the latter is the note, "Prisoner remanded until Tuesday, March 29th, at 10.30, (sgd.) K. Campbell." Then the deposition of Martha Louise Walker beginning on a separate sheet of paper is attached to the file, and the only heading of the deposition is, "Martha Louise Walker sworn, saith," and at the end there is the signature "Louise Walker," and beside it the signature "K. Campbell, P.M." Martha Louise Walker is not mentioned in the caption of the depositions as one whose deposition is being taken on the charge against the accused; and that caption refers to the depositions of witnesses taken on the 25th of March. But the deposition in question manifestly was not taken on the 25th of March, so there is really nothing on the face of the papers to show that the deposition was taken by a justice of

the peace on the charge against the accused. It is, therefore, quite impossible to say that it purports to be signed by the justice by or before whom it purports to have been taken.

At the request of counsel, I attached to the case reserved a copy of the evidence the committing justice gave at the trial; but clearly his evidence cannot be looked at to remedy the defect on the face of the deposition. No extrinsic evidence will make the deposition purport to be signed otherwise than it is; *Reg.* v. *Miller*, 4 Cox C.C. 166.

A deposition, technically speaking, is evidence put down in writing by way of answer to questions; and although the deposition in Exhibit 2 does not follow the form given in Schedule S. of the Code, I think it is one that in form substantially complies with the directions of the Code. It purports to be signed by the justice before whom it purports to have been taken; and, this being so, all that the Crown had to prove was that it was taken in the presence of the accused and that he had an opportunity of cross-examination. If there are any other facts proof of which would make the deposition inadmissible, it rested with the prisoner to prove them, and none have been proved. Both depositions were read to the jury as evidence against the prisoner on all the counts of the indictment; and the evidence in the deposition that is now held to be inadmissible, though it was not taken on the charge on which the jury convicted the prisoner, is of such a nature that it could hardly fail to influence the jury in their verdict. I think we must assume that it did influence them, and that a substantial wrong was occasioned to the prisoner; and, that being the case, there will have to be a new trial.

Order for new trial.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., C.P., AND ROSE, J.

THE QUEEN v. McGREGOR.

Summary conviction—Failure to show territorial jurisdiction—Certiorari—'Perusal of the depositions'—Warrant to apprehend—Reference to, as to locality of offence—'Full answer and defence'—Cr. Code 850, 889.

1. A summary conviction which does not show on its face that the alleged offence was committed within the territorial jurisdiction of the magistrate should not be quashed, if the warrant which was issued to compel the attendance of the accused to answer the charge was returned with the certiorari and shows that the accused was charged with an offence within the magistrate's territorial jurisdiction.

2. *Semble*, the "depositions," upon perusal of which the court may be satisfied that an offence has been committed over which the justice has jurisdiction, and may, under Cr. Code 889, decline to quash a conviction for insufficiency, etc., will include the caption to the depositions; and if such caption states that the "charge" was read over to the accused, the court may refer to the statement of the charge contained in the "warrant to apprehend," in order to ascertain whether or not the evidence taken related to an alleged offence committed within the district for which the magistrate acted.

3. The accused is not denied the right to make "full answer and defence" to the charge (Cr. Code 850), by reason of the magistrate having stated, after hearing the evidence for the prosecution, that a denial on oath by the accused would not alter his opinion as to her guilt.

ARGUED: February 16, 1895.

DECIDED: March 2, 1895.

Motion ex parte for a rule nisi to quash the summary conviction of the defendant by the stipendiary magistrate for the district of Nipissing for selling liquor without a license, contrary to the provisions of the Liquor License Act.

Section 889 of the Criminal Code provides as follows:

No conviction or order made by any justice of the peace and no warrant for enforcing the same, shall, on being removed by certiorari, be held invalid for any irregularity,

informality or insufficiency therein, provided that the court or judge before which or whom the question is raised is, *upon perusal of the depositions*, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, *over which such justice has jurisdiction*, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant: Provided that the court or judge, where so satisfied as aforesaid, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section 883 conferred upon the court to which an appeal is taken under the provisions of section 879.

Du Vernet, for the motion.

TORONTO, March 2, 1895.

MEREDITH, C.J.—

The first objection to be considered is that it does not appear from the conviction or from the evidence that the offence of which the defendant was convicted was committed within the district of Nipissing.

The conviction states that the offence was committed "at her residence near Warren," but there is nothing stated as to where the residence of the defendant or where Warren is situate, and Warren not being one of the municipal or territorial divisions of the Province, we cannot take judicial notice of the fact that it is in the district of Nipissing; and therefore, if we were confined to looking only at the conviction, it must be held bad as not showing that the offence of which the defendant was convicted was one which the stipendiary magistrate had jurisdiction to try: *Regina* v. *Young*, 5 Ont. R. 184*a*.

Sufficient, however, appears upon the papers returned to bring the case within the provisions of section 889 of the Criminal Code, 1892.

These papers include the warrant for the apprehension of the defendant, which states the complaint to be that the defendant ". . . at the township of Dunnet, near Warren, unlawfully did sell, or cause to be sold on her premises . . . ;" and the heading to the depositions is as follows:

" Sept. 6. Magistrate's Court at North Bay, 3 this p.m. Mrs. McGregor appeared charged with unlawfully selling liquor at her house in the township of Dunnet on the 10th August, 1894. The charge having been read over to her, she pleaded not guilty."

It may well be that the charge read over to the defendant was the charge as stated in the warrant under which she had been apprehended, and if that be so, it was to that charge that the evidence was directed, and the description of the place where the offence was committed is shown to be in the township of Dunnet, which we know judicially to be within the district of Nipissing; and sufficient therefore appears to enable us to say that, upon a perusal of the depositions, we are satisfied that an offence of the nature described in the conviction was committed over which the justice had jurisdiction, and that without in any way questioning the correctness of the decision in *Regina* v. *Young*, 5 Ont. R. 184*a*, already referred to.

It was further objected that the conviction could not be upheld because the stipendiary magistrate included in the costs of the prosecution which the defendant was ordered to pay, the costs of her arrest under the warrant and the bringing her under it before the magistrate, which, it was urged, was illegal, because, as was contended, a summons and not a warrant should in the first place have been issued.

Assuming that the including of these costs in the costs which the defendant was ordered to pay would, had the warrant been improperly issued, have been a ground for quashing the conviction, as to which we desire to express no opinion,

we think the objection fails because of the combined effect of sections 559 and 843 of the Criminal Code, 1892. It was discretionary with the magistrate to issue either a summons or a warrant as he might deem best.

It was also objected that the stipendiary magistrate refused to permit the defendant to be examined on her own behalf, and also to permit a full examination of her husband as a witness for her; but it does not appear from the affidavit filed in support of the motion that this objection is well founded.

There was, we think, no such refusal to permit the evidence to be given as was contended for, but at most an expression of opinion of the magistrate that in view of the evidence adduced by the prosecution a denial by the defendant on oath of the charge would not alter his opinion as to her guilt, and after that expression of opinion the counsel who appeared for the defendant did not further press for her examination as a witness on her own behalf; and it also appears that the husband was examined and gave evidence denying the sale of the liquor. It is impossible under these circumstances to say that the stipendiary magistrate refused to hear the evidence, or that there was a denial of the right of the defendant under sec. 850 of the Code to make her full answer and defence.

The only objection which remains to be considered is that the defendant being a married woman, and the sale of the liquor having taken place in the presence of the husband, it must be presumed to have been made through the compulsion of the latter, and therefore to have entailed no penal consequence upon the wife, and in support of that position *Regina* v. *Williams*, 42 U.C.R. 462, was relied on.

Even if the law were now the same as it was when *Regina* v. *Williams* was decided, that case would be no authority in favour of the defendant's contention, because, as Gwynne, J., points out, the presumption invoked in her favour "is removable by proof that the wife was the more active party, even when the offence was committed in the presence of her

husband" (p. 463); and that was the case upon the evidence here.

Since *Regina* v. *Williams* was decided, sec. 83 of the Act then in force, R.S.O. 1877, ch. 181, has been amended by the addition of what is now sub-sec. 2 of sec. 112 R.S.O. 1887, ch. 194, which provides that the person actually selling or otherwise contravening any of the provisions of the Act, who is styled "the actual offender," as well as the occupant of the premises, shall be personally liable to the penalties and punishments prescribed by the Act, and that they may be proceeded against jointly, or that the actual offender may be prosecuted separately, at the option of the prosecutor, but that both of them shall not be convicted of the same offence; and, besides this, the presumption relied on is now entirely swept away by sec. 13 of the Code.

If anything further be necessary to fix the defendant with liability, we think there was evidence that she was the occupant of the premises in which the liquor was sold, and so liable as the occupant: see *Regina* v. *Campbell*, 8 Ont. Pr. 55.

All the objections raised therefore fail, and the order nisi must be refused.

ROSE, J., concurred.

Motion refused.

Note: *Summary jurisdiction—"Full answer and defence"—Cr. Code 850.*

Every one charged with a criminal or quasi-criminal offence should have full opportunity to answer and repel the charge; he cannot have this opportunity if not allowed the utmost latitude in cross-examination. But it is equally clear that those who cause criminal charges to be instituted are not bound to disclose the sources of their information. And where a liquor license inspector prosecuting under the Canada Temperance Act himself gave evidence in support of the charge and was asked to disclose the source of information on which the complaint was founded, it was held that he

Note—*Continued.*

was not bound to answer. *Regina* v. *Sproule* (1887), 14 Ont. R. 375, (Cameron, C.J. C.P.)

The prosecutor must answer questions relative to the disqualification of the magistrate to sit on account of interest, and must state on cross-examination whether he saw the magistrate about the matter before laying the information. Ibid.

Where it is desired on behalf of the defence to show that the magistrate has an interest in the prosecution, the defendant is entitled to call the magistrate as a witness; and if the magistrate refuses to be sworn and the associate magistrate refuses to use his authority to require him to be sworn, the defendant is thereby denied the right of making a "full answer and defence." *Regina* v. *Sproule* (1887) 14 Ont. R. 375.

And where magistrates in a prosecution under a provincial statute refuse to hear witnesses for the defence on the ground that the statute makes no provision for calling such witnesses, a *mandamus* will lie to compel the magistrates to re-open the complaint, for in the absence of any provision expressly taking away the right to examine witnesses, their evidence is admissible. *Re Holland* 37 U.C.R. 214; *Regina* v. *Washington* (1881) 46 U.C.R. 221, 233. A refusal to examine witnesses for the defence and to permit a cross-examination of the witnesses for the prosecution is a clear miscarriage of justice and a clear excess of jurisdiction which invalidates the conviction. Cameron, C.J. C.P. in *Regina* v. *Sproule* 14 Ont. R. 375, 384.

The fact that a magistrate is sworn as a witness will not disqualify him from resuming his seat as one of the adjudicating justices. Bacon's Abridgment, 7th ed., vol. III., p. 206; *North* v. *Champernoon* 2 Ch. Cas. 79.

[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE OUIMET, J.

THE QUEEN v. McLINEHY.

Witness — Privilege from incriminating answers — Separate indictment against, for receiving stolen goods—Canada Evidence Act, sec. 5 (amendment of 1898).

1. A witness who is not a party to the indictment for theft submitted to the jury, cannot be excused from answering questions on the ground that he himself is indicted with another as receiver of the goods stolen, and that his answers might incriminate him; but his objection should be noted and the evidence should not be used against him at his trial.

The prisoner was being tried on an indictment for theft.

T. Murphy, sr., a witness called by the Crown, asked to be excused from answering questions, on the ground that he himself was indicted with another as receiver of the stolen goods, and his answers might criminate him.

The Court held that a witness, not a party to the indictment submitted to the jury, cannot be excused although his answers might criminate him; but his objection would be noted and his evidence would not be used against him at his trial.—Sec. 5 of the Canada Evidence Act, as amended by 61 Vict. (Can.), ch. 53.

Cooke, Q.C.,, for the Crown.
Wilson, for the prisoner.

Note: *Witness—Incriminating answers.*

The new section 5 of the Canada Evidence Act substituted by the amending statute of 1898 is set forth at page 397 of vol. I. Can. Cr. Cas., and is there commented on.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROBERTSON, J.

THE QUEEN v. PONTON (No. 2.)

Change of Venue—Hostile demonstration against trial judge—Mob at first abortive trial—Affidavits of jurors denying intimidation—Admissibility—Additional expense of prisoner's witnesses—Payment of, by Crown—Cr. Code 651.

1. A change of venue may be ordered under Cr. Code 651, on the application of the Crown, where at an abortive trial, at which the jury disagreed, a hostile demonstration was made against the judge by a mob assembled in the streets during a short adjournment of the trial.

2. The change is rendered "expedient to the ends of justice" (Cr. Code, 651), because the conduct of the mob tended to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial; and this notwithstanding the sworn statements of every juror at the abortive trial that they were in no way intimidated or influenced by the mob demonstration, part of which took place within hearing of the jury during their deliberations.

3. Affidavits from the jurors denying intimidation are properly admissible in evidence on a motion to change the venue where such intimidation is charged.

ARGUED: April 8, 1899.

DECIDED: April 15, 1899.

Motion in Judge's Chambers on behalf of the Crown after an abortive trial at which the jury disagreed, to change the place of trial of the defendant Ponton, upon an indictment for robbing the office of the Dominion Bank at Napanee. The judgment upon a former motion, made before such trial, is reported, 2 Can. C. C. 192, *ante*.

J. R. Cartwright, Q.C., and *L. G. McCarthy*, for the Crown.

Wallace Nesbitt and *E. G. Porter*, for the defendant Ponton.

TORONTO, April 15, 1899.

ROBERTSON, J.—

This is a second application to change the place of trial, and is made, as the former was, on behalf of the Crown. The accused, William H. Ponton and one Robert Mackie, were charged at the last Napanee Assizes with having robbed the Dominion Bank at its branch office in Napanee.

Before the Assizes commenced, an application was made before me to change the place of trial, under sec. 651 of the Criminal Code, upon the ground that the sympathy felt for the accused Ponton and Mackie in the town of Napanee and in the county of Lennox and Addington, of which it was the county town, was such that a fair trial could not be had. There were a great number of affidavits filed pro and con, but the result was that I was obliged to refuse the motion, the grounds of which refusal are fully set forth in my former judgment. Since then, at the Assizes holden at Napanee in November last, the trial took place and resulted in the conviction of Mackie, but the jury could not agree as to Ponton, and they were discharged. Ponton's trial was then traversed to the then next Assizes at Napanee, which are fixed for the 24th April instant.

This motion is now made on the same material as was used on the former application, supplemented by the affidavits of Mr. Sheriff Hawley; William Greer, inspector of the criminal investigation department of Ontario; Samuel C. McElwain, of Toronto, provincial constable, who was in charge of the jury at and during the time they were sent to their room to consider their verdict; Samuel Adams, chief of police of Napanee; and Mr. Hector Charlesworth, of Toronto, news reporter for "The Mail and Empire," reporting the proceedings for that paper at the trial. And from these affidavits it appears that the jury retired to consider their verdict at 4.40 o'clock p.m., and the Court adjourned about 6 o'clock p.m., to reassemble at 8 o'clock the same evening. During the interval a very large crowd congregated in and about the court house, a portion of which numbering 200 to 300

persons, could be seen from a window at the end of the corridor on which the jury room was situated, and could plainly be heard at the door of the jury room. They were swearing, hooting, shouting, and behaving in a most disorderly manner, and some of them shouted out: "Don't you fellows bring Billy Ponton in guilty! He is not guilty. What's the matter with Billy Ponton? He's all right." This was shouted by a large number of voices, and could be distinctly heard in the jury room by the jurors. This hooting, yelling, and shouting continued for at least one and one-half hours, and, in the opinion of these deponents, "such disorderly conduct, shouting, hooting, and yelling must have had an intimidating effect upon the said jury, and that the deponents are of opinion that had the said jury that evening returned a verdict of guilty against the prisoner Ponton, they could not have safely passed through the said crowd assembled in and about the said court house." On the morning of the 3rd of December, after the jury had been discharged, the constable McElwain says he was appealed to, in his capacity as a constable, by one of the jurors who was supposed to have been one of those who had stood out for conviction, as he (the juror) feared that the crowd, who had again gathered round the streets, and who were making threatening remarks as he passed them, would do him bodily harm. The crowd so assembled were in a very excited condition, and from the remarks made, and their general behaviour, it was perfectly evident that their sympathies were strongly with the prisoner Ponton. That the inspector (Greer) mingled with and in the said crowd, so far as it was possible to do, but, owing to its being so dense, it was only with great difficulty that he succeeded in doing so. The remarks which he heard were of the most grossly insulting character in regard to the learned Judge, and many of such remarks were threatening to the person of the Judge, but, owing to the darkness of the corridors and the density of the crowd, it was impossible to "locate the parties" making them. That at 8 o'clock p.m., after the jury had retired to consider their verdict, the sheriff and his officers reported to the Court that the crowd was so dense

and so disorderly that it would be impossible to bring the prisoners safely into the court room from the gaol, and his Lordship thereupon directed that the Court be adjourned until 9 o'clock next morning, and it was adjourned accordingly. That after the adjournment the crowd moved from the court house to the central part of the town, and the sheriff and a guard escorted the Judge to his hotel. As he (the Judge) approached, the crowd became uproarious, pushing, jostling, hissing and making insulting remarks to the Judge. The Judge, with the same guard, passed his hotel for the purpose of going to a barber's shop, which he reached and entered. The crowd congregated outside, getting more boisterous and excited, renewing the hooting, yelling, and making grossly insulting remarks at and in regard to the Judge. When it became evident from the remarks made and their general behaviour that, unless the crowd immediately dispersed, they would become violent, and when the Judge was in apparent danger of being set upon, the sheriff says he then consulted with the County Crown Attorney, and they came to the conclusion that he should read the Riot Act at once. That he believed it to be his absolute duty to do so, in order that the person of the Judge should be protected, and he read it twice, and after that advised the crowd to disperse, and the officers then succeeded in getting them to disperse.

The offensive language applied to the Judge by persons in the crowd is stated in words by Mr. Charlesworth, but they are of such an offensive and of so contemptuous a character, that I refrain from perpetuating them by setting them out here, but Mr. Charlesworth says, in regard to these expressions, that "it was perfectly evident that the behaviour of the crowd was due to the fact that they did not consider the learned Judge's address to the jury as favourable to the prisoner Ponton as they (the crowd) desired, and that their sympathies had been strongly aroused on behalf of the prisoner Ponton." Mr. Charlesworth also says: "That upon my arrival at Napanee, and daily during the said trial, I was approached by citizens of Napanee who threatened me

with physical violence unless the reports which I sent to my paper were favourable to the prisoner Ponton. So general and violent did these threats become during the last two days of the trial, that I was compelled to ask for and to obtain police protection."

In answer to these affidavits, the accused files his own affidavit, in which he gives a detailed account of the progress of the proceedings *ab initio* against him. He says that he has been wholly dependent upon the generosity of his friends for means to defend himself against the charge, and was obliged to apply to the Government for assistance at the last trial to enable him to procure his witnesses, etc., and on which the Government came to his relief by promising assistance to the extent of paying the fares and witness fees of some of the witnesses, amounting to about $450; yet the said moneys, he says, were not forthcoming until the last few days. He also says that, although he has since the last trial obtained employment, his wages are not more than sufficient to keep himself and his widowed mother and his sisters, who have hitherto been to a large extent dependent on him, and he has no means whatever of procuring the attendance of witnesses, many of whom have to travel long distances, and some of whom are experts residing out of the country, and will not attend for the ordinary pay of witnesses, and charged him on the last trial about $10 per day, and some of whom have not yet been paid. He also says that a large number of his witnesses, who are necessary and material, reside in Napanee and have always been willing to attend and have attended the former trials and testified on his behalf free of charge, and are still willing to do so at Napanee, but if they are obliged to go elsewhere to testify would require to be paid their witness fees and travelling expenses. He also says he has a large number of witnesses who are necessary and material, residing at Belleville, twenty-five miles distant from Napanee, who have hitherto attended on his behalf free of expense and have signified their willingness to do so again, and have stated that they will refuse to go elsewhere where the expenses would be increased, etc., unless they are paid their

travelling expenses and witness fees; that if the place of trial is changed, it will be impossible for him to procure the attendance of his witnesses without the assistance of the Crown, and the total expenses paid, as he cannot, on account of their residing out of the country, compel their attendance on an ordinary criminal subpœna, nor can he procure means to pay them elsewhere; that the offence of which he is charged, and of which he is entirely innocent, was laid at Napanee, where he has heretofore upon said charge been prosecuted, and where the jury have as heretofore stated disagreed, and he was, at the time of making said charge and for some time before, a resident of the said town of Napanee, and it is at the said town that he lost his position, good name and reputation by the charge so made, and he submits that he should have an opportunity of recovering the same where it was lost to him; that his personal acquaintance with the people of the county of Lennox and Addington, outside of Napanee, is very limited, and that he personally does not know fifty people of the county outside of Napanee, although the county contains upwards of 30,000 of a population; that he does not believe he can procure a proper trial elsewhere by reason of his poverty and inability to secure the attendance of his necessary witnesses, and in that county he believes his character and reputation are fairly well known and known favourably, whereas in another county little or nothing would be known of him, and he is advised and believes that he is entitled as a matter of right to any advantage which his former good name and reputation entitle him to; that anything which took place at the last trial, as stated in the affidavits filed by the Crown, he knows nothing of personally, nor is he in any manner whatever responsible for the same, and anything that did take place was not in any manner whatever counselled or procured by him, and he submits that he should not be prejudiced in his right to have his trial at Napanee, by reason of the action of any person or persons over whom he has no control.

He also filed twelve affidavits, one made by each of the twelve jurors who were empanelled to try the case, as to

the effect of the doings, sayings, hootings, yellings, and general misbehaviour of the crowd, on the jurors, while they were deliberating in their room and otherwise.

But Mr. McCarthy on behalf of the Crown takes the objection as to these twelve affidavits that they cannot be read and should be taken off the files, and in support of his contention he cites *Doe dem. Hagerman* v. *Strong* (1851), 8 U. C. R. 291; *Jones* v. *Duff* (1848), 5 U. C. R. 143; *Regina* v. *Fellowes* (1859), 19 U. C. R. 48; *Farquhar* v. *Robertson* (1889), 13 Ont. Pr. 156; Taylor on Evidence, 9th ed., sec. 944, and other authorities, all of which I have read and considered, but, in my judgment, they are not applicable to this case.

These cases affirm the principle, which is well understood, that after a verdict has been rendered, affidavits of the jurors as to what took place between the members of the jury, while in the jury room, considering their verdict, or affidavits from outsiders, or those not of the jury, as to statements or admissions made by a juror or jurors after being discharged, cannot be read; and the late Sir John B. Robinson, Chief Justice, in *Doe dem. Hagerman* v. *Strong*, 8 U.C.R. at p. 292, states the reason for this; he says: "It would open the door to abuse and would lead to great uncertainty and vexation in the administration of justice, if courts were to listen to accounts by jurors of what has passed in the jury room; or were to attend to relations of what individual jurors may have said to others of the grounds and reasons of their verdict after they had rendered it."

Now here no verdict was rendered, and this application is not for the purpose of setting aside any action taken or to correct any alleged mistake made by the jury; but the Crown having filed the affidavits already referred to, in which the deponents all swear that the conduct of the crowd outside the court house and immediately in view of the jury room was such that, in the opinion of the deponents, it must have intimidated the jurors, etc.; these affidavits of the jurors are filed in answer for the purpose of showing that the deponents before mentioned are mistaken in their respective opinions, as they, one and all, swear that the conduct of the crowd in

no way whatever either intimidated or interfered or influenced them in their deliberations, and some two or three of them say that they did not even notice that a noise was going on at the time. If the objection was that the affidavits of the jurors show no cause for not granting this application, that would be reason for not giving any effect to them, but that would be no reason for removing them from the file.

I think, therefore, I must read the affidavits, and having done so, I am of opinion that they do not in any way afford an answer to this application. It is not how the jurors individually may have been affected, or whether they were in any way affected; the fact remains admitted that a large crowd of disorderly people congregated around the court house on the occasion of the deliberations of the jurors in a most important case, one fraught with the most serious consequences; and the conduct of that crowd tended to bring the administration of justice into contempt, which cannot be allowed under any circumstances, and, if passed over without judicial protest, would open the door to the grossest abuse; and although the jurors in question may not in any way have been influenced by the riotous behaviour of the crowd, there is no saying how another jury might be, and that is a material factor in this application.

But it is not the only one, or the only ground on which this application is made. It is alleged that the learned trial Judge was most grossly insulted and threatened by persons in that crowd after he had left the bench and before the business of the Court or that trial had concluded by the jury being discharged, and afterwards and to such lengths did the conduct of the crowd extend, that it was necessary to read the Riot Act before they dispersed.

In regard to that there are a number of affidavits filed in answer to the most damaging statements made in the affidavits filed for the Crown, made by Mr. E. G. Porter and his junior, who were and are counsel for the accused, and by ten prominent citizens of Napanee, all of which I have most carefully considered, and they all agree that there

was a large, noisy crowd in the street, opposite the hotel at which the learned Judge was staying, and opposite the barber shop where he was at the time, after the adjournment at 8 o'clock of the night in question; and they all agree that in the crowd were some of the "best citizens" of that town, while a large proportion was made up of young boys and girls, and some of the affidavits state that there were "ladies" there also; that there were a large number of people from Belleville, the home of Ponton, who had come down to be present at the termination of the trial, etc., but they say that the principal part of the noise was made by the young boys, and that no one of them heard any remarks nor saw any misbehaviour directed to or applied to or referred to the Judge, but it seemed to be an endeavour amongst the boys and young people assembled to get up some fun or amusement, and there did not appear at any time to be any danger to any person or persons, nor did they or any of them hear any threats or see any demonstration of any kind of violence or that might lead to violence or danger, nor did they or any of them see at any time any occasion for reading the Riot Act. In addition to what is stated above, Mr. E. S. Lapum, the ex-mayor, says that a large portion of the people then and there assembled were attracted there by the ringing of the fire bells, which took place just about the time the Judge entered the barber shop, and this was done, as the ex-mayor says, by the chief of police, as he is informed, although there was no fire, and he cannot tell why it was done, unless to augment the crowd, which is the effect it had. As to this statement, there is in the affidavit of the chief of police an emphatic denial; and as Mr. Lapum says he was only "informed," and does not name his informant, I cannot accept his statement made on information, as to which he does not even vouch his belief. The bell was rung no doubt, and that goes to show the spirit of the people engaged in this objectionable proceeding, and confirms the facts as set forth in the affidavits filed for the Crown.

Notwithstanding the opinions thus expressed by all these respectable persons, I cannot, on their own showing, divest

myself of the opinion that the persons there assembled were so assembled for some other than a harmless and inoffensive purpose. It is to my mind most extraordinary that "respectable citizens" should be found in a noisy crowd such as is admitted by all, to the number of 400 or 500, and who were shouting and hooting, and evidently collected there for no proper purpose. In my opinion, the statements made in these several affidavits strengthen the case made out by the Crown, that they were there behaving in a boisterous and riotous manner, all of which was directed against the learned Judge. If not, what reasonable excuse is there for that gathering, assembled on the street, on a cold December night, except for the purpose, manifested by their conduct, as sworn to by the sheriff and other officers of the law, and Mr. Charlesworth, to wait for the reappearance of the learned Judge from the place were he was at that time, preparatory to returning to his hotel? I am bound to believe that these gentlemen who make the affidavits on behalf of the accused did not hear the offensive epithets directed at the Judge, or did not see or hear anything but good-natured badinage; but the evidence of those who did not see or hear what is alleged and sworn to have taken place, is never considered so satisfactory as the evidence of the witness who swears positively to what he did see and hear. The former is of a negative character, the latter is affirmative, and when stated in the clear and distinct manner it is set forth by one who occupies the first official position in the county (the sheriff) supported by the inspector and other respectable deponents, must have more weight than that of the other persons, all of whom feel more or less (as well they may) the compromising position in which the conduct of that crowd has placed their hitherto well-conducted and orderly town.

From all that appears, I am of opinion that the sheriff acted wisely and properly in so reading the Act. There was no saying what would have happened had not the crowd been brought to their senses by such action on the part of the sheriff.

It is contended, however, that admitting for the purposes of the argument that the facts sworn to by the sheriff and the others are true in regard to such of those disorderly proceedings as were directed to the learned Judge, these facts do not warrant depriving the accused of his right to be tried by a jury taken from the county in which the alleged crime is said to have been committed. And counsel contended that the section of the Code under which this application is made, on the authorities, only applies to cases where it may not, in the opinion of the Court or Judge, be reasonably certain that a jury can be empanelled who would render a fair verdict on the evidence, etc. In regard to this I am not prepared to say whether the learned counsel is right. It may be so, but that does not alter the case. I suppose that such a state of things as is in this case presented never occurred so as to make it necessary to adjudicate, etc., but the Code declares that "whenever it appears to the satisfaction of the Court or Judge * * that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county, or place other than that in which the offence is supposed to have been committed * * the Court * * may * * order that the trial shall be proceeded with in some other district, county, or place within the same Province, named by the Court or Judge in such order." So that it is not a question as to the jury altogether. If it appears to the satisfaction of the Court or Judge that it is expedient to the ends of justice, by reason of anything which may interfere with the fair trial of the case in the particular county, to make a change, it is, I take it, the duty of the Court or Judge to give force and effect to the conclusion come to, by reason of the facts and circumstances which may be established to his satisfaction.

Now in this case, after mature deliberation, I cannot divest myself of the opinion that it is expedient on the facts here presented, and that the ends of justice require, that the place of trial be changed from Napanee to some county other than Lennox and Addington ; not because twelve honest and intelligent men cannot be obtained as jurors, with the ample

means provided by law, in that county, if they were not in any way interfered with and left to their deliberations after hearing the evidence and the Judge's charge, etc., and untrammelled by a boisterous crowd of sympathizers with one side or the other, such as were assembled around the court house while the jury were deliberating on their verdict at the last trial. A factor has appeared and has been made manifest on this application which was not presented on the former, which has entirely changed the state of things, and which has satisfied me that it would not be proper to run the risk of a recurrence of such. On the former application the grounds alleged were that, in the opinion of certain respectable and intelligent residents of the county and of the town of Napanee, a jury could not be found with any degree of certainty within the county which would warrant the Court in believing that a fair trial could be had, owing to the widespread sympathy for the accused. That case was not made out to my satisfaction, but the ground is changed now. It is not a matter of *opinion* as to what might be, in regard to the jury. Facts are stated and sworn to which establish that what those persons believed would take place, *has* taken place. A repetition of that kind of conduct cannot be again invited.

I am not unmindful of the right of the accused, as recognized by law, subject to the provisions, of course, under which this application is made, to be tried in Napanee, but being satisfied that it is expedient to the ends of justice that the place of trial should be changed, I have no choice but to declare accordingly; but the accused has made out such a strong case for assistance in procuring his necessary and material witnesses, that I think the Crown should secure their attendance at the trial. As to the particulars of the order, I will settle them if counsel cannot agree.

Then, as to the place of trial, I have had the benefit of consultation with eight of my brother Judges (as the Crown and the accused cannot agree as to the place), and all save one are of opinion that Toronto is the most proper place

available, as the present circuit list of assizes now stands, and I am of that opinion myself. Both counsel for Crown and accused are not favourable to Toronto, but as neither have furnished me with any reason on which I can act, I can do no better than act on my own judgment, supported, as it is, by my learned brethren of the Bench.

Order changing venue.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, J.

Re NUNN.

Justice of the Peace—Inquiry commenced by one and completed by two—Invalid commitment.

1. Where evidence on a preliminary inquiry is commenced before one justice of the peace and finished before two justices, a committal by the two is irregular unless both have heard all the evidence.

ARGUED: April 10, 1899.

DECIDED: April 10, 1899.

This was an order nisi calling upon the keeper of the County Gaol at Victoria to show cause why a writ of habeas corpus should not issue, commanding him to bring up Fanny Nunn, a prisoner under bail upon a warrant of committal granted by two Justices of the Peace, in order that she might be discharged from custody. The facts appear in the judgment.

G. E. Powell, for the applicant, referred to *Re Guerin* (1888), 16 Cox, C.C. 596.

VICTORIA, B.C., April 10, 1899.

WALKEM, J.—

This is a peculiar case, and one, as far as I know, which has not hitherto been before the Supreme Court. The prisoner,

Fanny Nunn, laid an information in October last against one Annie Keats for using threatening and abusive language. On the hearing of the information before Mr. Macrae, then police magistrate of the City of Victoria, Fanny Nunn was a witness. Her evidence was subsequently impeached, and proceedings commenced against her for perjury. The hearing of this latter charge was opened on the 1st of November last, before Mr. Shotbolt, a Justice of the Peace. After the evidence of Mr. Macrae, who was of course, a most important witness, had been taken, the hearing was adjourned to a subsequent day. On the latter day Mr. Shotbolt was joined by Mr. Dalby, another Justice of the Peace, and the case was continued before them; the result being that they committed the prisoner for trial.

The commitment has been objected to on the ground that Mr. Dalby was a party to it, although he was not present when Mr. Macrae gave his evidence; and therefore, had only partially heard the case.

A court of petty sessions may be constituted of one or more justices of the peace. In this case, the court that ordered the commitment, constituted as it was of two justices of the peace, was, obviously, not the court that heard all the evidence. In my opinion, the intervention of Mr. Dalby rendered the proceedings so irregular as to make the commitment an invalid one. If Mr. Macrae's evidence had been given over again in Mr. Dalby's presence, there could have been no such objection as that now urged. It may be quite true that Mr. Shotbolt could, as he had heard all the evidence, have committed the prisoner on his own responsibility; but as he did not do so, the prisoner's counsel is entitled to say, as he has done, that had Mr. Dalby heard all the evidence he might have taken a different view of it from that taken by Mr. Shotbolt, and, possibly, have come to the conclusion that the prisoner should not have been committed. I have been referred to the case of *Re Guerin* (1888), 16 Cox, C.C. 596, and although it is not on all fours with the present case, the principles there laid down by the Court clearly

show that Mr. Powell's motion should be granted, and the prisoner released from custody and her bail discharged.

Order accordingly.

Note: *Committal for trial—Preliminary inquiry—Change of magistrates.*

The case of *Re Guerin* (1888), 16 Cox C.C. 596, was an extradition matter in which some of the depositions were taken before one magistrate and the inquiry was continued and the remaining depositions taken before another magistrate, who made the commitment. Mr. Justice Wills, delivering the judgment of the court on a habeas corpus application, said :—

"It is contrary to all my ideas and experience of justice "for depositions taken before one magistrate to be con- "sidered by another magistrate sufficient evidence to "commit a prisoner upon, without having seen the "demeanour of the witnesses when they were giving their "evidence, and so being in a position to judge for himself "of the truth of their statements. Every prisoner is entitled "to a *judicial decision* by a magistrate as to whether a "prima facie case is made out against him. This decision, "it is true, does not decide whether the accused person is "guilty or not, and, therefore, is not final. It is none the "less a judicial decision, and it may be a matter of vital "importance to the accused whether there is sufficient "evidence to commit him or not, and I think the proceedings "ought to be conducted throughout by the same magistrate "who has heard the witnesses and observed their demeanour. "The principle of the common law is clear upon the matter."

Remand—Cr. Code 586, 588—Code form P.

The illegality of a commitment made after such a change of magistrates is not cured by a statute empowering justices, in cases where it is necessary or advisable to defer the examination or further examination of witnesses, to remand the accused and to order him to be brought before "the same or

Note—*Continued.*

such other justice or justices as shall be there acting at the time appointed for continuing such examination." Such an enactment is to be construed merely as providing for the case of the first magistrate dying or resigning, and it does not enable one magistrate in ordinary cases to take up a case where another left off; he must hear the case *de novo*. *Re Guerin* (1888), 16 Cox C.C. 596, 601.

The Code form P gives, in the form of warrant remanding a prisoner, a direction that he be brought before the remanding justice "or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge," etc. And by Cr. Code sec. 588 the justice may, before the expiry of the time of remand, order the accused person to be brought before him *or before any other justice* for the same territorial division. So also under the special provision contained in Cr. Code 586 (*c*) regarding verbal remands for a time "not exceeding three clear days," the accused may be brought "before the same or such other justice as shall be there acting at the time appointed for continuing the examination." These provisions must, therefore, on the principle enunciated in *Re Guerin*, supra, be construed as allowing another magistrate to continue the proceedings without rehearing the depositions already taken, only in case of the death or resignation of the first magistrate.

This will, however, not prevent the use at the trial, under Cr. Code 687, of the deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalities of the Code are complied with as to the manner of taking and signing depositions. *Reg.* v. *De Vidal* (1861), 9 Cox C.C. 4 (Blackburn, J.), approved in *Re Guerin* (1888), 16 Cox 596 (Wills and Grantham, JJ.)

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J. C.P., AND ROSE, J.

THE QUEEN v. STEELE.

Magistrate—Disqualification—Bias—Relationship to prosecutor—Sharing fine—No conflict of testimony—Costs.

1. To invalidate a conviction on the ground of bias in the convicting magistrate, it is not necessary that actual bias should be proved, and a conviction will be quashed if the facts justify a reasonable apprehension of bias.
2. If the accused is aware of the disqualifying circumstances at the time of the hearing before the magistrate, he should take objection then to the magistrate acting.
3. Where the prosecutor in summary proceedings is the magistrate's father, and the statute under which the prosecution is brought entitles the prosecutor to a share of any fine imposed, the justice is disqualified from adjudicating upon the case.
4. A conviction made under such circumstances will be quashed, although there was no conflicting evidence on the summary trial.

ARGUED: May 21, 1895.

DECIDED: July 13, 1895.

Motion to quash a summary conviction of the defendant made by George H. Clark, a fishery overseer and *ex officio* a justice of the peace, for an infraction of the Fisheries Act, R.S.C., 1886, c. 95.

TORONTO, July 13, 1895.

MEREDITH, C.J.—

Several objections were urged against this conviction, only one of which it is, in the view we take, necessary for us to consider.

The complainant, Andrew Clark, is, by the provisions of the Act under which his complaint was laid, entitled to one-half the penalty imposed, and he is the father of the convicting magistrate; and the question is whether, under these circumstances, the defendant objecting to his doing so, the magistrate should have heard and adjudicated upon the complaint.

If the case is to be determined on the rule which applies to challenges for favour in the case of jurors, the magistrate was in this case, by reason of his relationship to the complainant, clearly disqualified; the rule applicable to such challenges being, as stated by Littleton, that it is a good ground of challenge "if the juror be of blood or kindred to either party, . . . and this is a principal challenge, for that the law presumeth that one kinsman doth favour another kinsman before a stranger; and how far remote so ever he is of kindred, yet the challenge is good:" Coke on Littleton, 157*a*.

The rule with regard to the disqualification of a judge seems to be different. In *Brookes* v. *The Earl of Rivers*, Hardres Ex. R. 503, in answer to an objection that one of the parties was related to the judge by marriage, the Court said that it was not a good objection, "for favour shall not be presumed in a judge." This case is referred to with approval in *The Queen* v. *Dean, etc., of Rochester*, 17 Q.B. 1, at p. 31, and is also mentioned in Stone's Justices' Manual, 26th ed., at p. 728, as an authority for the proposition that relationship to one of the parties does not in the case of a justice of the peace operate as a disqualification. To the same effect are the opinions of Chief Justice Allen and Mr. Justice Tuck in *Ex. p. Grieves*, 29 New Brunswick Rep. 543.

The provisions of such Imperial statutes as 41 and 42 Vict., ch. 16 (the Factory and Workshop Act, 1878), sec. 89, which provides that in a proceeding before a court of summary jurisdiction with respect to an offence against the Act alleged to have been committed in or with reference to a factory or workshop, the occupier of that factory or workshop, and the father, son or brother of such occupier shall not be qualified to act as a member of such court, seem to indicate that, in the view of the framers of such Acts, some legislative prohibition was necessary to effect a disqualification of the magistrate on the ground of relationship to one of the parties, and therefore to support the correctness of the statements of the law to which I have just referred, while they indicate also that the probabilities of bias are so great

in the case of relationship in so close a degree as that to which the section quoted applies, that it was proper that one related within those degrees to the occupier should be absolutely disqualified for being a member of the court.

It would seem, therefore (though a logical reason for the difference is difficult to discover), that while in the case of a juror favour is presumed from relationship, it is not presumed in a judge.

There are many cases to be found in the books in which convictions, orders and decisions of tribunals, the member or a member or members of which were, according to the principles upon which, in English Courts, justice should be administered, disqualified by reason of interest or bias from adjudicating upon the matters in question before them, have been quashed on that ground.

That a pecuniary interest, however small, is an absolute disqualification, is beyond question.

Where, too, the magistrate or person exercising judicial functions is the prosecutor, or the person or one of several persons on whose behalf, at whose instance or in whose interests the proceedings are taken, he is disqualified, conformably to the rule which is well expressed in the maxim, "*nemo debet esse judex in propriâ suâ causâ.*

Within neither of these classes does the present case fall, but there is undoubtedly another class of cases in which the supervising jurisdiction of the superior courts over the inferior courts and judicial bodies has been exercised, the limits of which have not been defined, and probably advisedly so, but have been stated in general and comprehensive terms; and it is within that class, if any, that the conviction we are considering must fall.

In *The Queen* v. *Rand*, L.R. 1 Q.B. 230, Mr. Justice Blackburn said: "Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that, where there is a real bias of this sort, this Court would not interfere."

In *The Queen* v. *Meyer*, 1 Q.B.D. 173, the same learned Judge said: "The question is, Was Mr. Meyer really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter?" And again, referring to the *Rand* case, he said: "The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices' decision."

The Queen v. *Milledge*, 4 Q.B.D. 332, was a case coming within the second class to which I have referred, the ground of the decision being that the justices practically made an order in a case where they were prosecutors.

The Queen v. *Gibbon*, 6 Q.B.D. 168, was a case of the same class as the *Milledge* case.

In *The Queen* v. *Handsley*, 8 Q.B.D. 383, the *Milledge* case was recognized as a correct decision, and the *Gibbon* case was disapproved of, not on the incorrectness of the rule recognized in it, but because the rule was not applicable to the facts of the case, and the language of Mr. Justice Blackburn was practically repeated by the Court—"in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter."

In *The Queen* v. *The Justices of Great Yarmouth*, 8 Q.B.D. 525, Mr. Justice Field said: "The administration of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind."

The Queen v. *Lee*, 9 Q.B.D. 394, may also be referred to as an authority as to the second class of cases.

In *The Queen* v. *Farrant*, 20 Q.B.D. 58, it was held that the mere fact that a magistrate, who was a surgeon and had attended a person who had been injured by an assault, had endeavoured to induce him not to prosecute and had conveyed to him a message from his assailant offering an apology and suggesting a settlement, did not show that he had such a substantial interest in the result as to make it likely that he would have a bias, and to disqualify him from hearing a complaint laid by his patient against his assailant for the assault. Mr. Justice Stephen, in delivering judgment, referred to what he spoke of as a leading principle of English law, that no one is allowed to be a judge in his own case, and said: "That means that the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge. . . . But the law does not stop there, for there may be an interest which has substantially the same effect as a pecuniary interest, though not of the same nature." And he refers to the *Rand*, *Meyer* and *Handsley* cases, and adopts the rule laid down in them; and he then goes on to say: "The question here is whether Mr. Farrant had such a substantial interest, other than pecuniary, as to make it likely that he has a real bias."

In *Leeson* v. *General Council of Medical Education*, 43 Ch. D. 366, Lord Justice Cotton said (p. 379): "Of course, the rule is very plain that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case—either in his own case or in any case where he brings forward the accusation or complaint on which the order is made."

In *The Queen* v. *Gaisford* (1892), 1 Q.B. 381, Mr. Justice Mathew, at p. 383, said: "It was argued on his behalf that it was incumbent on the complainant to show that the justice was in fact influenced; but, in my opinion, it is sufficient to show, as was held in *Reg.* v. *Milledge*, that he might have been influenced." And Smith, J., said: "On the question

of bias, apart from pecuniary interest, I entirely agree with the law as laid down by Cockburn, C.J., in *Reg.* v. *Milledge.*"

In *The Queen* v. *Henley* (1892), 1 Q.B. 504, Mr. Justice Lawrance said: "The cases . . . show most clearly that, if there is any danger of a substantial bias likely even unconsciously to influence a justice, he ought not to sit."

In *The Queen* v. *Huggins* (1895), 1 Q.B. 563, Mr. Justice Wills said:

"In these cases there is always a certain degree of difficulty, owing to the confusion which has arisen from a failure to clearly distinguish between the different classes of cases in which decisions have been quashed upon certiorari on the ground of the improper constitution of the tribunals which gave them, namely, cases in which one of the tribunal had a pecuniary interest, cases in which, though having no pecuniary interest, he nevertheless had a bias, and cases in which he filled the part of prosecutor as well as judge. . . . Here there is no question of Martin" (one of the convicting justices) "having had any pecuniary interest in the result of the litigation, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias. It appears that Martin belongs to a small class of privileged persons for whose protection these proceedings were taken. Under those circumstances, I cannot help thinking that it would not be in the general interests of justice that the conviction should be allowed to stand. It is impossible to overrate the importance of keeping the administration of justice by magistrates clear from all suspicion of unfairness. Suppose that all these six justices had been licensed pilots, or suppose, on the other hand, that they had all been unlicensed pilots; in neither case would anyone venture to say that the tribunal would have been a fair one. But if that be so, then the objection must equally exist when one only out of the six is a licensed pilot. It is far safer to enlarge the area of this class of objections to the qualification of justices than to restrict it."

Mr. Justice Wright concurred, and added: "Some

of the cases in which the Court has been asked to interfere are cases of decisions by administrative bodies, such as the London County Council and others. They are very different from cases of decisions by judicial tribunals. In my judgment, the Court ought to be slow to interfere in the former, but in the latter ought to interfere on much slighter grounds."

Regina v. *The Justices of Cumberland*, 58 L.T.N.S. 491, is a case in which the Court interfered by quashing the conviction, although, as Mr. Justice Mathew said, the justice had no pecuniary interest, nor was he influenced by any pecuniary motive, nor did he act from anything but a sense of public duty, and did what he thought was incumbent on him as a magistrate. Mr. Justice Smith in that case said, referring to the *Rand* case :—" This is the point : ' wherever there is a likelihood that the judge, whether from kindred or any other cause, would have a bias in favour of one of the parties, it would be very wrong of him to act.' That is the rule ; where there is a real likelihood, from kindred or any other cause, that he may have a bias in favour of one of the parties, he ought not to act."

The Queen v. *The Justices of Dublin* (1894), 2 Irish R. 527, may also be referred to as containing a review of the English cases on the point in question, and the opinions of the Judges of the Queen's Bench Division as to the effect of them. See also *The Queen* v. *Fraser*, 9 Times L.R. 613 ; *Allinson* v. *General Council of Medical Education* (1894), 1 Q.B. 750.

The principle to be deduced from these cases is, I think, that if a state of things exists, whether arising from relationship to the parties to the litigation or from other causes, which is likely to create a bias, even though it be an unconscious one, in the magistrate, in favour of one of the parties, or, as put by Mr. Justice Wills in the *Huggins* case, which causes a " reasonable apprehension of bias"—that is sufficient to prevent his adjudication upon the matters in controversy being upheld, if it be impeached by a party who either had no knowledge of the existence of that state of

things, or, knowing of it, objected to the magistrate acting; and in dealing with this question, which is one of fact, regard must be had to the principle upon which the rule is founded, that it is of the highest importance, in the general interests of justice, to keep its administration by magistrates clear from all suspicion of unfairness. I paraphrase here the language of Mr. Justice Wills, which is, if I may be permitted to say so, a clear and satisfactory exposition of the rule in question, and of the principle which underlies it.

In reaching this conclusion, I do not overlook the fact that it is not sufficient that there be a mere possibility of bias, as was said in several of the cases to which I have referred. That is quite true; and, on the other hand, it is not necessary that there should be real bias proved—it is sufficient if there be a likelihood of real bias or a reasonable apprehension of bias.

In the Province of New Brunswick there are several reported cases where the disqualification of the justice has been placed upon the same grounds as apply to the challenge for favour in the case of a juror: *Ex p. William Wallace*, 26 N.B.R. 593; *Ex p. Margaret Wallace*, 27 N.B.R. 174; *Ex p. Jones*, 27 N.B.R. 552, may be referred to.

The Supreme Court of Nova Scotia, it would appear from the report of the case *Re D. Barry Holman*, in 3 R. & C. 375, quashed a conviction on the ground that one of the convicting justices was the father of the complainant, but, in the very meagre statement of the case which the report contains, no reasons are given for the decision.

And in several of the United States the same rule seems to be applied both to judges and justices of the peace, where there is no statutory provision on the subject, as there is in many of them: Am. & Eng. Enc. of Law, vol. 12, pp. 40 to 48 and notes; p. 395, note 16.

The authorities in this province are not numerous, but, so far as they go, follow the English rule; and in *Regina* v. *Langford*, 15 Ont. R. 52, my brother Rose incidentally had under consideration the same question as arises here, and

gave effect to the view which I have expressed as to the scope of the rule, and applied it in a case not, I think, distinguishable from this.

There is no case which determines that relationship to one of the parties may not be found to be of such a character as to lead irresistibly to the conclusion that real bias was likely to arise, and the cases to which I have referred, and from which I have made somewhat extended excerpts, warrant me in coming to the conclusion that in this case, owing to the relationship of the complainant to the justice and the former's pecuniary interest in the result of the prosecution—he being entitled, as I have said, to half the penalty, and being liable also, in the event of the prosecution failing, to be ordered to pay the costs—the conviction cannot be upheld.

Can there be any doubt that there was in this case ground for a reasonable apprehension of bias, real likelihood of bias —unconscious it may be—but, nevertheless, bias which might operate to prevent the scales of justice being held evenly, and which justified the defendant in refusing to permit the magistrate before whom he was brought for trial, with his consent to sit in judgment between him and his accuser, that accuser being his own father?

It is quite true that in this case there was no conflict of testimony; but can anyone doubt that, had the justice to decide between accepting the sworn statement of his father and that of a stranger who was called as a witness for the defence, there would have been a reasonable apprehension that there might have been in his mind a bias, unconscious perhaps—conscious it might have been—in favour of the father's testimony? I cannot doubt it, and have no hesitation in coming to the conclusion that there was in this case such an interest on the part of this magistrate as made the existence of real bias likely, or, using again the language of Mr. Justice Wills, gave ground for a reasonable apprehension of bias which made the magistrate incompetent to sit, and his adjudication one that cannot be allowed to stand.

It is of the utmost importance, I think, in a comparatively new country, such as this, where the magistrates are for the most part untrained men, and in many cases having necessarily but a limited knowledge of the law which they are called upon to administer, that the supervising power of the Court over their decisions should be freely exercised to prevent adjudications being given effect to where they are at variance with the fundamental principles upon which our law is and must be administered in order to command the respect of the community, or where the constitution of the tribunals by which they are pronounced is such as to create a well-grounded suspicion of unfairness.

Even if I were not, as I think I am, supported by authority in coming to the conclusion at which I have arrived, I am not fettered by any authority which prevents my determining that the conviction should be quashed; but I am prepared to enlarge the area of the class of objections upon which the appellant relies, if it be necessary to do so, so as to make it impossible to uphold a conviction made under such circumstances as exist in this case, rather than to permit an adjudication which violates the fundamental principles underlying the administration of justice to stand.

I do not think the case is one in which the defendant should have costs. Apart from any other reason, he has not filed upon this application any affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts.

The conviction must be quashed without costs, and there will be the usual order for the protection of the magistrate.

ROSE, J., concurred.

Conviction quashed.

Note: *Disqualification of magistrate—Bias.*

The connection of the magistrate as an honorary member of a society which supplied funds part of which were used to make a purchase of liquor upon which to base a prosecution for illegal sale, is not a ground of disqualification if as such

Note—*Continued.*

honorary member he is not entitled to take any active part in the society's affairs. *The Queen* v. *Herrell* (Man.) 1 Can. Cr. Cas. 510.

Nor is a magistrate disqualified from trying a liquor case because he receives a fixed appropriation from a municipal corporation for services in prosecutions of liquor cases, payable out of a fund created by the imposition of fines. *Ex parte McCoy* (N.B.) 1 Can. Cr. Cas. 410, and see Note vol. I, page 411.

Where the defendant was convicted of having unlawfully assaulted the complainant, a married woman who was the daughter of the convicting justice, the relationship was held to be a good ground for quashing the conviction; but as no objection had been taken by the accused and as it appeared that the magistrate had acted in good faith, costs were not ordered against him. *The Queen* v. *Langford* (1888) 15 Ont. R. 52, (Rose, J.)

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, HANINGTON, LANDRY AND BARKER, JJ.

THE QUEEN v. THERIAULT.

Manslaughter—Justification—Excusable homicide—Reasonable apprehension of grievious bodily harm to wife and children — Judge's charge — Misdirection — Failure to object—Substantial wrong or miscarriage at trial—New trial— Cr. Code 45, 744, 746 (f).

1. Reasonable apprehension of immediate danger of grievious bodily harm to his wife and children, then in the house of the accused, is a justification of shooting the deceased, who was one of a party who had invaded the prisoner's house and committed a wholly unprovoked assault upon him, and who had, up to the time of the shooting, continued their violent and unjustifiable conduct there towards the accused and his family, and were destroying chattels in the house.
2. On a trial for murder, if the trial judge directs the jury that imminent peril of the prisoner's own life or of the lives of his family is a ground of justification for killing, in defence of his household, one of a party committing an unprovoked assault upon him, but does not direct them that a reasonable apprehension of immediate danger of *grievious bodily harm* to the prisoner or to his wife and family is an equal justification, such omission constitutes a substantial wrong or miscarriage occasioned on the trial [Cr. Code 746 *(f)*], and a new trial should be ordered, where the circumstances shown in evidence are such as to point much more to the latter ground of justification than to the former.
3. If a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction.
4. The strictness of the rule applied in civil cases in some of the provinces by which an objection not raised at a time when it could have been remedied, cannot afterwards be allowed, should not be applied to cases of misdirection in criminal cases. (*R.* v. *Fick* (1866) 16 U.C.C.P. 379, disapproved.)

ARGUED : February 10, 12 and 13, 1894.

DECIDED : June 13, 1894.

This was an appeal under sec. 744 of the Criminal Code, from a conviction for manslaughter.

The prisoner was indicted at the last circuit for Victoria, for the murder of one Thomas Mockler in August, 1893.

The jury found him guilty of manslaughter, and he was sentenced to five years in the penitentiary. An application was made on the part of the prisoner to Mr. Justice Tuck, before whom the case was tried, to reserve certain questions of law arising out of his direction to the jury for the opinion of this court, but he declined to do so. Application was then made under sec. 744 of the Criminal Code (50 Vict. cap. 3), to the Attorney-General for leave to appeal, which was granted, and on motion to the court, the following case was stated :

" 1. Upon the whole evidence should the learned judge have directed an acquittal,

(*a*) because the homicide was justifiable or excusable, being committed in defence of the possession of the dwelling house ;

(*b*) because the deceased was, at the time he was killed by the prisoner, in the act of committing such an offence as was before the 1st of July last (1893) a felony, in the dwelling house ;

(*c*) because the deceased was, at the time he was killed by the prisoner, in the act of committing an indictable offence in the dwelling house with force ?

" 2. Should the learned judge have left the following questions, or any of them, to the jury :

(*a*) Whether or no the homicide was committed by the prisoner necessarily in defence of the possession of his dwelling house ;

(*b*) Whether or no the deceased was, at the time he was killed by the prisoner, in the act of committing such an offence, as was a felony before the 1st of July last, in the dwelling house ;

(*c*) Whether or no the deceased was, at the time he was killed by the prisoner, in the act of committing an indictable offence in the dwelling house with force ;

and directed them that if they found any of the questions in the affirmative the homicide was justifiable, or might by them be found to be excusable ?

" 3. Was it misdirection by the learned judge in saying to the jury that the prisoner, to be justified or excusable in

the homicide, must have been under a reasonable apprehension of imminent peril of life to himself or his wife or some member of his family?

"4. Should the learned judge have left to the jury the question of reasonable apprehension by the prisoner of great bodily harm to himself or his wife or some member of his family, as well as the apprehension of imminent peril of life, and directed them that if they found such apprehension, the prisoner was justified or could, by them, be found excusable for the homicide?

"5. Under the whole evidence, is the prisoner entitled to an acquittal?"

The facts of the case were these: The prisoner, who is a Frenchman, resided with his wife and family in a partially finished house in Victoria county. His son was married on the 28th August, 1893, and as is customary on such occasions among the French people of that part of the county, there was a dance in the evening at the prisoner's house to celebrate the event. A party of English-speaking people, five in number, of whom the deceased was one, went to the dance, though uninvited and apparently, except in the case of one or two of them, without any acquaintance even with the prisoner or his family. The party altogether numbered some forty persons. It is said that on such occasions the recognized customs of the locality are not very exacting as to invitations. At all events the English party, unbidden guests as they were, were received and made welcome. Everything seemed to have passed pleasantly until somewhere about midnight, when Harry Mockler, one of the five Englishmen, and a brother of Thomas Mockler, the deceased, commenced making a disturbance by pushing against some of the men and treading on the toes of a daughter of the prisoner. The prisoner immediately remonstrated with him and told him that he did not wish any row in his house, and that if he intended making a row he must go out of the house and do it. Mockler seems to have replied in a very rough way, and then apparently without the slightest provocation

whatever assaulted the prisoner. A scuffle and general melee ensued between the English party (except Thomas Mockler, who does not seem to have taken much part in it) and the French party. The women were much terrified, and several of them took refuge upstairs, and some of the men followed their example. Not a very long time elapsed before the French party were absolutely driven out of the house by the English party, led by Harry Mockler, the principal offender, no one remaining except those who had fled to the attic. The lower part of the house, consisting of the kitchen and a large unfinished room about twenty-five feet long, was left in possession of the English party. During the fight the prisoner received very rough treatment, and was rendered unconscious. Dr. Chouinard, who was called in to see him the next morning, thus describes his condition: "He had a cut on the head, bruises and cuts on his face, his right hand was cut from wrist to first joint of little finger, the thumb artery cut, all the veins in the back of the hand were cut, and he was weak from loss of blood." In fact, so weakened was he from loss of blood caused by these wounds that he was found in a fainting and unconscious condition a short distance from the house, a short time after the shooting took place. Not much over half an hour elapsed from the time the row may be said to have commenced until the shot was fired which resulted in Mockler's death, and from twelve to fifteen minutes elapsed from the time the French party was expelled until the shot was fired. During this half hour the furniture in the lower part of the house was practically demolished. Chairs were freely used during the row, and after the English were left in possession the destruction seems to have gone on. The witness Clarence LeClaire described this as follows: "Nearly all the dishes were broken, the table, stove, stovepipe—two of the joints of pipe were cut through as with an axe,—the sewing machine was broken, pictures broken, a toilet set in a box, also two lamps and a lantern, and boards from the main part of the house had been taken up and thrown into the kitchen." In addition to the prisoner, several of his guests, in fact it would seem

all who did not flee from the premises altogether or take refuge upstairs, were more or less injured. Morrin, an old man 66 years of age, was struck and bruised. His wife, who went to his assistance, was knocked down by a blow on the head, and others were assaulted and bruised. The lights in the lower part of the house were all extinguished. The prisoner escaped from his assailants and took refuge with the others in the attic of his house, after being beaten in the way described. He left his wife and children there, escaped with some others by means of a ladder from the attic window, went down to his mill, about 125 yards from the house, got his gun, came up to the house and discharged it through one of the open windows, instantly killing Thomas Mockler, the charge of shot having penetrated his skull over the left ear and literally blown his brains out. The gun was reloaded and fired a second time by the prisoner, as he says, in the air. The disturbance seems to have ceased immediately on Mockler's death, and his four companions left and went home, a gun having been discharged, apparently at them, as they were leaving, but whether this was the second shot fired by the prisoner, or one said to have been fired by LeClaire, was doubtful. The prisoner gave evidence himself, and his account of the shooting was as follows: After describing how, after escaping by the ladder, he said a few words to some of the party outside, he went to the mill where his fowling piece charged with powder was, he proceeded:

"It was a partridge gun, the powder was in it, and I put the shot in. I put the cap on the gun—it (the cap) was all full of blood—my hand was all bloody. I took the road to return. After I got up the hill, before the kitchen, Alexie Claire was there. He asked me if the gun was ready to fire, and I told him that I didn't think it would go off, as there was too much blood on the cap. He said, 'Give it to me and I will fix it for you.' At that time he, Alexie Claire, had a gun in his hand, too. He put a cap on my gun. I heard an awful noise going on in the house all this time. No light in either apartment. I went alongside the house there to fire

to frighten them, and I passed near John Castoniere. He put his hand on me and said, 'Stop a bit.' I stopped, and the noise was getting worse and worse, and he said, 'Advance and fire.' I advanced along the kitchen. The first window was boarded up. The windows on the other side are boarded up also. Then, advancing towards the second window, which was open, it was very dark inside. I could see nothing. I fired the gun into the house. I fired the gun standing up, and fired it pretty high." He also said that he did not know there were people in this room into which he fired, and as soon as he fired he went back to the people in front of the kitchen; that Alexie Claire then loaded his gun, he furnishing what was necessary to load it; he (the prisoner) then advanced alongside of the window, the noise in the house not having stopped, and fired the gun into the air. He then went down the road leading to the mill, and then heard some one say they (the English party) were going. He also said that he got his gun of his own motion, and not at the suggestion of anyone else, and that Claire fired his own gun after he (the prisoner) had fired the second time, and that Claire fired at the party going away, to hit them, as he judges. It was at this time that the prisoner became faint and unconscious, as already mentioned.

In his charge to the jury, the learned judge said:

"Under this state of facts, it is contended before you, that the prisoner cannot possibly be rightly convicted of murder; that he ought not to be even convicted of the crime of manslaughter, and that the homicide is justifiable or excusable.

"Let me deal with the last, in the first instance; and, at the outset, I wish to say that I entirely concur with what has been said by Mr. Gregory as to the right of the prisoner to use whatever force was necessary to put out of his house every person there who made a disturbance. The English party had gone to his house uninvited; they were made welcome and allowed to engage in the festivities of the evening. It was their bounden duty to behave as gentlemen, and not as blackguards. It was because they, at least some of

them, grossly abused the hospitality which they had received, that this trouble has arisen. It is not part of my duty to discuss the point whether or not it is the habit to attend dances among the French people without first having received an invitation; but this I do know, whether invited or uninvited, all guests should conduct themselves with propriety. Returning, then, to the question of justifiable or excusable homicide. If, while the prisoner was being kicked or was down with several persons on top of him, or during the time his wife and children were in the attic and he was there, he had reasonable ground to apprehend that his life was, or the lives of his wife and children were, in imminent peril, and had killed one of his assailants, that would have been justifiable homicide; or, if a man's house is being invaded at night, and a burglar is endeavoring to break in, and the person in possession of the house shoots and kills, such a homicide is justifiable in defence of property and of life; or if a loaded revolver or a knife be presented at a man's head or heart, and he has reasonable ground to fear that his life is in danger, and he shoots and kills, that homicide is justifiable. But if no such condition exists, but some other, which may in fact reduce the crime from murder to manslaughter, then the homicide is not justifiable . . .

"Now it is as old as history almost, and it is a common expression, which has reached here, which reaches everywhere over the country, that a man's house is his castle; and if in the night time or day time, the owner of a house, or another who has possession of it, feels that his house is being invaded for the purpose of burglary, for burning or murder, or as the learned counsel has properly put it, any other felony, he has the right to resist that invasion, and if in order to successfully do so, it is necessary for him to take the life of the man who is trying to get into his house for any of these purposes, the law says he is justified; and I am satisfied that what has been read, and the law that has been cited by the learned counsel go no further than this, and with that law I entirely agree. If I differ from the learned counsel, it is in this: that the circumstances of this case, and the

facts, as they have been detailed in evidence to you do not make that law applicable here to-day. He has contended that three felonies were perpetrated in that house that night:

"1st. A stealing, or, as it is called by the common law, larceny.

"2nd. A felony, inasmuch as an assault by wounding with intent to do grievous bodily harm was committed, and

"3rd. Stealing, causing bodily fear; but I fail to entirely agree with his application of the law to this case. For instance, I will put that which will be familiar to you: Suppose that I should go into any one of your houses—wrongfully go there; go into your parlor and smash your piano and your chairs and tables. I am guilty of trespass, to be sure, but will any one, as a lawyer, say that because I do that, I am guilty of stealing; that thereby I show that disposition the law speaks of—the *animus furandi*—the intention to steal. It may be from mere—I was going to say deviltry—but from the most mischievous disposition, I go into your house and there commit this trespass; I break your chairs, table and piano—I smash them up—can it be said, simply because I do that, that I went with the intention to commit a felony or the intention to steal, or, to adopt the definition which is found in the books and which has been pointed out to me by the learned counsel, to deprive you of your property? I do, in a sense, deprive you of your property; I render it unfit for your use, but I do not commit the crime of stealing. I have done an outrageous act, as these men did; but apply it to this case, and, if I am right, it seems to me it is not larceny. I say it distinctly, that what the men did that night did not, so far as stealing goes, show them to be guilty of that felony—larceny.

"So, I am not prepared to say that even that felony (assault by wounding with intent to do grievous bodily harm), was committed in the house that night; and therefore my mind does not go with the legal contention of the learned counsel, that, upon this state of facts, and with the law he put forward—that under the facts and the law—applying the facts to the law, it is the duty of the judge to direct you to

acquit the prisoner. . . . I am not prepared to direct you that you should acquit the prisoner on the ground that the homicide was justifiable or excusable. The most I can say to you is this: that if you can spell out from the evidence in the case any facts which warrant you in coming to the conclusion, that when Theriault went back to the house, after he had got his gun at the grist mill, he had reasonable ground to believe that his own life was in imminent danger, or that the lives of his wife and children, who were upstairs in the garret, were in imminent danger, and that, in order to protect the life of himself, or the lives of his children, or the life of his wife, this shot should be fired, and somebody should be killed; if, I say, you can from any part of this evidence, spell that out, that he had this reasonable ground for this apprehension, you may say that he is justifiable or excusable in this homicide—in the killing of Thomas Mockler.

"Justifiable homicide is defined to be where the killing is in consequence of an imperious duty prescribed by law, or is, owing to some unavoidable necessity, induced by the act of the party killed, without any manner of fault in the party killing; and again, excusable homicide is where the party killing is not entirely free from blame, but the necessity which renders it excusable may be said to be partly induced by his own act (that is, the act of the party killed). Now, gentlemen, if you can, under the evidence, with the instruction I have given you as to justifiable homicide; if you can look into this evidence, and you know it as well as I do, and can make out from the evidence that this firing was done under unavoidable necessity for the protection of the man himself, or for the protection of his wife and family, I say, if you can do that under the evidence, you have the power to do it, and if you come to that conclusion, then it is your duty to find the prisoner not guilty.

"Because, there is a criminal culpable homicide—and those are the words which you have heard repeated—culpable homicide is either murder or manslaughter; it is either murder, or certain circumstances may reduce what is the larger offence to the minor one of manslaughter; and then

there is the homicide which is not culpable, is not an offence; and, therefore, if from the evidence, you can discern that which leads you to the conclusion that this man's life was in jeopardy, that the lives of his wife and family were in jeopardy, and that therefore there was an apparent necessity put upon him to do this shooting, then you will say that he is not guilty, because justifiable or excusable homicide is no offence.

"Looking at the circumstances of this case, can any one say that there was any imperious duty prescribed by law, or that the killing was owing to some unavoidable necessity, induced by the act of the party killed, without any manner of fault in the party killing; or can it be said that there was any necessity at all, which excuses the prisoner who did the killing? I am at a loss to point out to you any fact upon which you can find that this homicide was justifiable or excusable, unless, indeed, it be that you can find something in the evidence which goes to show that at the time the shot was fired, the prisoner's life was, or the lives of his family and wife were in imminent peril. I have already stated to you the facts: that when the prisoner left the attic, his wife and family were penned up in the attic, and were in great fear; that already an effort had been made (according to the evidence of at least one witness) by one of the English party to go up from below, with a threat to take life, but this was some time before the killing; and, when the prisoner returned from the grist mill, even admitting that the noise was still going on in the house, without any inquiries on his part as to the then condition of his wife and family, he pointed his gun into the main room and fired. If this was an unavoidable necessity, I fail to see it, but if you can see anything in the evidence which leads to the conclusion that the necessity existed, or spell out from the facts any such necessity, you have the power to do it, and to find the prisoner not guilty."

Geo. F. Gregory, Q.C., for the prisoner.

White, S.G., for the Crown.

FREDERICTON, N.B., June 13, 1894.

The following judgments were now delivered :

BARKER, J. [His Honour stated the facts as given above, and read extracts from the charge to the jury, and continued] :—

Mr. Gregory moved for the discharge of the prisoner and argued the points contained in the case stated, but, in the view which I take, it will not be necessary for me to discuss any of the questions argued, except that which relates to the misdirection, as I think there must be a new trial on that ground. It was contended that the learned judge had laid down the rule too narrowly in instructing the jury that to justify or excuse the homicide, the prisoner must have had reasonable grounds for apprehending imminent peril to his life or the lives of his wife and children. In *Reg.* v. *Smith*, 8 C. & P. 160, Bosanquet, J., (Bolland, B., and Coltman, J., being present) thus laid down the law : "But there is another question — did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it, and that it was necessary to protect his own life, *or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger.* If he used the weapon, having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he will be justified."

Substantially the same language is used in *Reg.* v. *Bull*, 9 C. & P. 22. Russell (4 ed. 889) and Roscoe (9 ed. 763) lay down the rule in the same terms. Sec. 45 of the Criminal Code, which in this respect is only declaratory of the law as it had before existed, provides as follows : "And every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death *or grievous bodily harm* from the violence with which the assault was originally made or with which the assailant

pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death *or grievous bodily harm.*"

The learned judge certainly did not direct the jury's attention to any other ground of justification than that of imminent peril of the prisoner's own life, or the lives of his family—nothing was said, in that connection at all events, as to fear of grievous bodily harm being equally a justification where, as in this case, the original assault upon the prisoner was wholly unprovoked, as it certainly was. I think it to be regretted that the prisoner's counsel, if his attention was turned to this important omission, as no doubt it was, had not asked the judge to have it supplied at the trial. In *Reg.* v. *Fick*, 16 U.C.C.P. 379, a case of rape, in which a similar point arose, the court say: "It has only to be added that there was no complaint made at the trial as to any point on which a direction was not given; nor upon which an erroneous or insufficient direction was given; nor any request made that any other or fuller charge should have been made than was made; and, in the absence of such an objection or request, it would be contrary to all practice to allow an objection to be raised at a time when it cannot be directly cured, and which, if it had been made at the proper time, might have been remedied on the spot; *and in this respect there is no difference between a civil and a criminal proceeding, at any rate when the prisoner is defended by counsel.*"

There are, I think, reasons why in criminal cases so strict a rule should not prevail in cases of misdirection. The judge is as much interested as any one else in seeing that the criminal law is properly administered, and it would not in my opinion be in accordance with the practice in civil cases in this province, that a party should be deprived of his right to a new trial on the ground of misdirection, by his omission to call the judge's attention to his mistake at the time.

Sec. 746 of the Criminal Code, sub-sec. *(f)*, has a proviso referring to applications such as this, as follows: "Provided that no conviction shall be set aside nor any new trial

directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

The effect of a similar proviso, as well as the improper admission of evidence, came up for discussion in *Makin* v. *The Attorney-General for New South Wales* [1894], App. Cas. 57. At page 69, the Lord Chancellor, in delivering the opinion of the Judicial Committee of the Privy Council, says: "Reliance was of course placed on the language of the proviso. It was said that if without the inadmissible evidence there was evidence sufficient to sustain the verdict, and to show that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence —that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend, not on the finding of the jury, but on the decision of the court. The judges are, in truth, substituted for the jury, the verdict becomes theirs, and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses, and weighing the evidence with the assistance which this affords. . . . Their lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them. . . . Their lordships desire to guard themselves against been supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the

jury, as, for example, where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence."

The principles here enunciated seem to me to be equally applicable to a misdirection or a nondirection, if it can be so called, such as is involved in this case. If the jury were told that imminent peril to life would alone afford a justification for the homicide, when a reasonable apprehension of grievous bodily harm would be equally a justification, and more especially when the circumstances were such as to point much more to the latter ground than the former, to sustain the conviction under the proviso in sec. 746 or without it, involves this court assuming the functions of a jury in deciding one of the crucial points of the case—that is, that the prisoner had no reasonable apprehension of grievous bodily harm to himself or his family. I have read attentively all the evidence given on the trial, and, whatever may be my own conclusions or views as to the existence in this case of that necessity, which those who take life in defence of their persons or property assume the responsibility of showing beyond reasonable doubt as a justification for so hazardous a step, I feel compelled to conclude that the misdirection complained of is on a material point, and entitles the prisoner to a new trial.

It is unnecessary for me, under these circumstances, to discuss the other points reserved.

I think that there should be a new trial.

HANINGTON, J. [His Honour referred at length to the evidence, and after stating that it was in proof that one of the deceased's party was, before the prisoner went for his gun, heard to say, "Let us go upstairs and kill them," or words to that effect, proceeded]:—

I am of opinion that the prisoner did not aim at or intend to kill anyone, but, in acting as he did, thought it was the only way of protecting his family and his house.

It was clearly shown that the situation and circumstances were such, that while the prisoner's own life was not in

danger when he fired the gun, yet he might reasonably suppose that the lives of his wife and family were in danger, or, at all events, that his wife and family were in immediate danger of being subjected to grievous bodily harm by the parties so then unlawfully in charge of his house, and violently destroying it and the property therein. The evidence certainly discloses most violent and unjustifiable conduct on the part of the deceased and his party, both towards the prisoner and his family, and to his dwelling house and property, and that such conduct continued up to the time of the firing of the gun which resulted so unfortunately and fatally. It appears that the prisoner's counsel on the trial contended, among other things, that the shooting was justified, not only if the prisoner's life or the life of his wife was, or the lives of his family were in danger, but also, if from what had taken place and what was then going on, the prisoner had reasonable grounds to believe, and did believe, that grievous bodily harm would immediately ensue to himself or his wife and family. The learned judge instructed the jury that he could not tell them that anything less than reasonable apprehension of danger to his own life or the life of his wife or the lives of his family would justify the firing of the gun; and he did not direct them that apprehension of danger of grievous bodily harm to himself or his wife and family would justify it, or give them any instruction on that subject. It does not appear that the prisoner's counsel, during or after the charge, directly asked that the judge should charge as to the apprehension of grievous bodily harm, but he claims that he called the judge's attention to it as a defence, and a point of law for direction during his (the counsel's) address to the jury.

Upon the jury finding a verdict of guilty, application was made to the learned judge to reserve certain points of law for the consideration of this court, but he declined to do so, and the prisoner's counsel at the commencement of the next Hilary Term applied to this court for leave to appeal under sec. 744 of the Criminal Code, which, after argument, was allowed; and the judge, upon a case submitted by counsel,

and on reference again to this court, settled the points for consideration as follows: [His Honour read the case.]

The case was fully and ably argued upon all the points and many authorities were cited, but as, in my opinion, the jury have not been as fully directed as would seem necessary, and were not directed that the prisoner would be justified in shooting if he reasonably apprehended immediate danger of grievous bodily harm to his wife and children then in the house, or (but as to this there may be no evidence) to himself. It was, I think, admitted by the Crown on the argument, that such apprehension of danger to his wife and family would justify the prisoner, but whether it was or not, the authorities clearly show that such would be the case, and that he could defend or protect his wife and family in the same way that he could himself; and, in fact, it could hardly be disputed that it would be his duty to do so. The case of *Reg.* v. *Smith*, 8 C. & P. 160, and numerous others, I think, are to that effect. Threatened danger to a man's wife and family afford the same justification as if it had been to himself. 1 Hale, P.C. 484; 4 Bl. Com., 186.

The prisoner was unlawfully, violently and seriously injured and forcibly driven from his house by the deceased and his friends; his friends certainly being possibly the more noisy and violent, but in this situation, I think, he was responsible with them for what was done. Whether or not the prisoner merely to regain possession of his dwelling or "castle," as it is termed, would, under the circumstances, be justified in the shooting, I will not discuss, though I am inclined to think that he would be.

If he was justified in protecting his wife and family from outrage and serious bodily injury it is enough, and that there is evidence of such reasonable apprehension, I think, cannot be doubted, and therefore it should have been submitted to the jury for their consideration, which clearly was not done.

It was contended on behalf of the Crown that the prisoner's counsel did not call the attention of the learned judge to the point, and ask his special direction thereon. I have already referred to the contention of the prisoner's

counsel as to what was done on the trial, and I think that whatever may be established as the practice in other provincial courts by cases such as *Reg.* v. *Fick*, 16 U.C.C.P. 379, and *Reg.* v. *Seddons*, 16 U.C.C.P. 389, it is not necessary for us to adopt it here in a case like the present. This court has, at times, even in civil suits, sent a cause down for a new trial because the charge was not as full or correct as it should have been, and might thereby have affected the result. See *Hoyt* v. *Stockton*, 2 Han. 60, where the Chief Justice in his judgment (page 66) says: "As, therefore, there is undoubtedly a very great preponderence of testimony in favor of the defendant's view, and as his case may have been prejudiced by the instruction that the jury received, that the plaintiff was entitled to recover for the distress on the first of January, 1868, however they might find on the question of fact, we think justice requires a further investigation." In *Goss* v. *Messinett*, 3 Kerr 201, a new trial was ordered, where the point on which the case might or should turn had not been laid before the jury either by the counsel or by the court in the way the court thought it should have been.

In cases such as the present, the aim of the court as well as of the Crown should be to see that the prisoner has a full and complete trial, and that a conviction is based on such points as reasonably arise upon the evidence; and it appears to me that if a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury, justice demands that such a conviction shall not stand.

The Criminal Code for the first time enables this court to deal fully with cases like the present, giving ample power to see that no injustice is done, and I feel that, were the present conviction to stand, injustice would be done to one who has very strong evidence to justify that for which he is now convicted. The prisoner's counsel contended that under the present provisions of the law, if the jury were not fully instructed, the old practice as to improper convictions should be followed, and the conviction therefore quashed. This would, of course, end all prosecution. That course could be

pursued if the court thought it in the interests of justice, but I do not so regard it. I think that to order a new trial is all that should be done here; this will enable both the Crown and the prisoner to again fully prove and submit the facts to another jury for their consideration on the points omitted on the last trial, and such others as the presiding judge may determine should be left to them.

TUCK, J. (dissenting)—

On the 28th of August, 1893, Harry Mockler, Eugene Price, George Price, Wilfred Price and Thomas Mockler, went, uninvited, to the house of the prisoner, where a wedding was being celebrated by a dance. The prisoner's son had been married on that day to a Miss Sirois. In the course of the night, and somewhere between twelve and one o'clock, Harry Mockler, one of what was called at the trial the "English party," started a row, as it is called in the evidence. He tramped on the foot of Emma Thibideau, the prisoner's daughter, insulted her by telling her to clear the way for him; splintered the kitchen door with his fist; refused to be quiet or leave the house, when requested to do so by the prisoner, insisting that he would not leave, and that there was no one in the house fit to put him out, and knocked the prisoner down in his own house. The other members of the English party, with the exception, perhaps, of deceased Thomas Mockler, participated in the row. The prisoner was roughly handled, his hand was lacerated, and his face, head and body were badly bruised, and this by some member or members of the English party. The women, young and middle aged, of whom there were quite a large number present, and the prisoner's young children, badly scared, frightened almost out of their wits, either fled from the house or betook themselves to the garret of the house above the kitchen, until finally having driven out all the French, except those who were upstairs, the English party had the main house and kitchen to themselves. During the time of the row, and afterwards, some members of the English party

made a general smash-up of all the furniture. They broke the stove and cooking-ware, sewing-machine, chairs and other articles, put out the lights, made almost a complete wreck of whatever was in the rooms, and, finally, having driven the French out, got entire possession of all that the rooms contained.

In the meantime the prisoner, who had been for a while, as he says, unconscious, had been assisted up the stairs by his son Alpheus, where he remained for a short time—about ten minutes. Then he descended from one of the windows by a ladder, went to his grist-mill, about 120 yards distant from his house, procured a shot gun, then charged with powder, loaded it with shot, put on a cap with his bloody fingers, started for his house, met Alexie LeClaire, had some conversation with him, removed the cap already on his gun and put another one on. This was done as the result of his talk with LeClaire, who asked him if his gun was capped and loaded, and, learning from the prisoner that the cap might be wet, put on another. Then the prisoner went to one of the windows, where at least some of the English party were, pointed his gun through the window, fired, and killed the deceased, Thomas Mockler. He died, as the doctors swear, instantaneously. The shot entered his head next the back of the left ear, near the top, blew away part of his skull and scattered his brains about the floor, wall and ceiling. While the prisoner was absent getting his gun, and almost until he fired it, the noise and uproar continued in the lower part of the house, and the women and children were in abject terror in the upper part.

The prisoner also fired his gun a second time, according to the witness, Neilson Jevsen (a witness called by the prisoner), about five minutes after the first shot, and shortly after the prisoner had fired the second shot, and shortly after the English party had left the house, a third shot was fired. George Price, a witness for the Crown, says that when the gun was fired the second time some of the shot struck ahead of him and he heard the rustle they made among the leaves or twigs.

Alexie LeClaire had also during the night procured a gun at the house, in the neighborhood, of Serite Thibideau, who is a son-in-law of the prisoner. This gun was loaded, and Alexie LeClaire fired it shortly after the second shot by the prisoner. Leaving out altogether what I said as to who fired the third shot, and as to what was said by the witness, Jevsen, I come to an important part of the charge. It is this: [His Honour read the above extracts from his charge and continued]: It is hardly necessary that I should deal with that part of the charge which refers to the crime of murder. My opinion at the trial was, and it is the same now, that the prisoner's act came perilously near to murder, and yet the tendency of the charge was that the jury should acquit of murder and find the prisoner guilty of manslaughter.

It seems to me to-day that the charge was most favourable to the prisoner, and absolutely right in point of law; and whether the dead man was English or the accused man is French, has really nothing to do with the question at issue.

The case on appeal relates only to that part of my charge which has to do with justifiable or excusable homicide. Of course the prisoner's counsel does not complain of that part of the charge, the effect of which may have had some influence in inducing the jury to bring in a verdict of manslaughter. Immediately after the verdict had been rendered, the prisoner's counsel moved to have a case reserved for the opinion of this court upon the following grounds, as I find them in my notes of the trial, namely: First, that I was wrong in not directing the jury that if what the English party were doing in the house at the time of the shooting amounted to larceny, they should acquit the prisoner. Secondly, that I should have directed the jury that the prisoner should be acquitted, because the deceased, when he was killed by the prisoner, was in the act of committing a felony, namely, wounding with intent to do grievious bodily harm, etc. These were the only two grounds mentioned by the prisoner's counsel. I refused to reserve a case, and upon a subsequent application made to me I again refused.

Upon application to him the Attorney-General granted

leave in writing to the accused to move this court for leave to appeal, and upon the motion being made leave was granted.

The following case was stated for the opinion of the court: [His Honour read the case].

It is said that there is no positive rule for the definition of justifiable homicide. It must depend upon the circumstances and surroundings of each case.

Take all of the evidence in this case, of which I have given a fair synopsis, a judge at the trial would have done a great wrong had he directed the acquittal of the prisoner, and therefore, I think, he is not entitled to an acquittal; certainly not for any reasons stated under the heads Nos. 1, 2 and 3. I can understand that if the prisoner, while in possession of his house, had been assaulted, and an effort was being made to turn him out of possession, he would have been justified in repelling force by force. And if he had not been able by any other means to avoid the assault or retain his lawful possession than by killing his assailant, such killing would have been *se defendendo*, for he had a right to the protection of his own house.

In Foster's Crown Cases, 273, the author says: "In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation or property, against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable." Of course, a man's house is his castle, as the books say, and he has the right to defend it, but in cases of life, which ought not to be taken wantonly, there ought not to be a departing from well-known and long-established rules. Look at the evidence in this case. This row had been going on, and was practically over, and the prisoner had escaped from his house, leaving the deceased and others in possession, and yet after ten or twelve minutes from the time the prisoner got away from the house, with

due deliberation, having put shot in his gun and recapped it, he points it through the window at the really only unoffending man (not knowingly, to be sure,) and kills him. To tell me that such an act is in defence of his possession is too absurd for argument. Authority after authority has been cited by the learned counsel for the prisoner, but none of them touch the facts of this case. I have examined them all, but I can find none which warrants me in coming to the conclusion that the prisoner was justified in killing Mockler in defence of the prisoner's possession. It was rather the deliberate act of a man who meant to kill one of the persons who made a disturbance in his house. This act was nearer murder than of excusable or justifiable homicide.

Then as to the second ground, whether or not the deceased was guilty of a felony which justified the killing. In 1 Hale's Pleas of the Crown, page 486, it is said: "Now concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point of a *se defendendo*. If a man come to take my goods as a trespasser, I may justify the beating of him in defence of my goods, as hath been said; but if I kill him it is manslaughter. But if a man come to rob me, or take my goods as a felon, and in my resistance of his attempt I kill him, it is *se defendendo* at least, and in some cases not so much." Again, in 2 Burn's Justice, 13 ed., page 1315, the text is: "It has been seen that a man is not justified in killing a mere trespasser, but if in attempting to turn him out of his house he is assaulted by the trespasser, he may kill him, and it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession, and in such case a man need not fly as far as he can as in other cases of *se defendendo*, for he has a right to the protection of his own house." The general principle is this: that there must be some unavoidable necessity, without any will, intention or desire, and without any inadvertency or negligence in the party killing, and, therefore, without any shadow of blame. Can any reasonable man say that there was such an unavoidable necessity in this case as to justify

the killing and leave the party who did it free from blame? In my opinion there was no such necessity, and the act cannot be justified.

I defy any one, after a most careful search in the books, to find a case anywhere approaching to this, where an act such as Theriault's has been held to be justifiable homicide, or where a judge, on the ground of defending possession, or resisting the commission of a felony, such as larceny, would have been justified in leaving to the jury any of the questions set forth in the first two points of the stated case. I have been able to find none, and have come to the conclusion that none of the authorities cited by Mr. Gregory, the learned counsel for the prisoner, warrants me in thinking that his contention is right.

Moreover, I am of opinion that the breaking of furniture by the young men, as it took place that night at Theriault's house, did not justify me in leaving to the jury the question, whether or not they were committing a felony or any indictable offence. And even if they were, under the circumstances and the whole evidence, any act of theirs did not justify the killing of Thomas Mockler.

Look at all the decided cases and the text books, and the result is, that only where there is a supreme or unavoidable necessity is one justified in taking the life of another. A charge like the present one is not to be decided by the splitting of hairs and nice distinctions, but on the broad principle, whether or not on the whole evidence, and under all the circumstances, the prisoner was justified in killing Thomas Mockler.

Although in my own opinion I could see no evidence which pointed to the fact that at the time of the shooting the prisoner was under a reasonable apprehension of imminent peril of life to himself or his wife or some member of his family, yet I left that question to the jury, without any request on the part of the prisoner's counsel to do so. No complaint is made as to this part of the charge, but it is urged that it did not go far enough—that I should have left the further question to the jury of reasonable apprehension

by the prisoner of great bodily harm to himself or his wife or some member of his family, and directed them, that if they found such apprehension, the prisoner was justified or could by them be found excusable for the homicide. It seems to me that this is the only, even possible, reason why the verdict in this case ought not to stand and the sentence be carried into effect.

My carefully considered opinion is, that in view of the whole case there is no evidence which ought to have justified a jury in finding that when the prisoner did the killing he had any such reasonable apprehension. If there was no reasonable apprehension of imminent peril of his own life, or that of his wife and family, then there was none of great bodily harm to either of them.

Now, in my opinion, the prisoner got off well when he was found guilty of manslaughter only. If the jury had found him guilty of murder, they would have been within their right, under the evidence.

For these reasons, I think, this appeal must be dismissed.

LANDRY, J.—

I agree with my brothers HANINGTON and BARKER.

Sir JOHN C. ALLEN, C.J., and VANWART, J., not having heard the argument, took no part.

New trial ordered.

[COUNTY COURT OF NORFOLK, ONTARIO.]

BEFORE ROBB, COUNTY JUDGE.

THE QUEEN v. HAWTHORNE.

Limitation of time for prosecution—Amendment of information to charge offence of another date—Liquor License Act (Ont.).

1. An information for illegal selling of liquor under the Ontario Liquor License Act cannot be amended so as to charge an offence of a date more than thirty days before the amendment is made.
2. The power of amending informations under the Liquor License Act, sec. 104, under which the justice may "substitute for the offence charged therein any other offence" against the Act, is controlled by the limitation of time for laying a fresh information (sec. 95), and as to the substituted offence is to be treated as laid on the date of the amendment.

SIMCOE, ONT., June 12, 1899.

This is an appeal from a conviction made by the police magistrate for the town of Simcoe for selling liquor on Sunday the 16th day of April last, during prohibited hours upon the appellant's licensed premises in the town of Simcoe, finding also a previous conviction and imposing a fine of $40 and costs.

An information was laid on the 11th May, charging the appellant, John Hawthorne, with selling on the 15th day of April. On the 25th May a summons was issued, and the case came on for trial on the 29th May, when, after hearing the evidence, the magistrate amended the information charging the offence to have been committed on Saturday the 15th or Sunday the 16th day of April, and convicted the defendant for an offence on the latter day.

By the 95th section of the Liquor License Act it is provided that "all informations or complaints for the prosecution of any offence against any of the provisions of this "Act shall be laid or made in writing within 30 days after "the commission of the offence or after the cause of action "arose, and not afterwards," etc.

Sec. 104: "At any time before judgment the justice, "justices or police magistrate may amend or alter any

" information, and may substitute for the offence charged " therein any other offence against the provisions of this Act; " but if it appears that the defendant has been prejudiced by " such amendment, such justice, justices or police magistrate " shall thereupon adjourn the hearing of the case to some " future day unless the defendant waives such adjournment."

Sec. 104 would seem, if read by itself, to confer upon magistrates unlimited power as to amendments, and unless it is controlled by the words of sec. 95, the conviction in this case would be warranted by the information as amended, the unlawful selling on Sunday the 16th April being clearly made out. The information is required to be in writing, and it must be laid within 30 days after the commission of the offence. If there is no written information the conviction would be bad, and so also it would be invalid if there was a written information charging an offence to have been committed more than 30 days before.

In *Reg.* v. *Bennett*, 3 Ont. R., at page 64, Mr. Justice Armour says: " The information was not on oath, nor did it " require to be, and it was amended in the presence of and " at the request of the prosecutor, and became then in effect " a new information."

If this became a new information when amended on the 29th May, it clearly could not support a conviction for an offence committed on the 16th April. That the power to amend is subject to the 30-day limit is apparently the only reasonable construction that can be arrived at. There is no other limit to the powers of amendment, and unless so restricted there would be nothing to prevent an amendment charging an offence committed months, or, for that matter, years before. In fact, it would make sec. 95 wholly inoperative, as by means of an amendment any charge could be tried at any time after the expiration of the 30 days to which by that section prosecutions are limited.

I was at first disposed to hold that this amendment might be upheld upon the ground that it did not charge another offence, but only related to the time within which the offence already charged was actually committed, but when it is

considered that unlawful acts of selling during the 24 hours from midnight on the 15th until midnight on the 16th April might have been given in evidence under the amendment which were excluded under the original information, I think this position is untenable.

A further objection was taken to the conviction in this case. From the minute of the magistrate it would seem that he noted that the defendant admitted the previous conviction charged in the information before judgment had been given upon the subsequent offence contrary to the provisions of sec. 101. It does not appear, however, whether this admission was made voluntarily by defendant, or in answer to a question put to him.

It is not necessary to consider this, however, as the conviction must be quashed upon the first objection, but, under the circumstances, without costs.

Conviction quashed.

Haverson, for appellant.

Innes, for prosecutor.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE AND STREET, JJ., SITTING AS A DIVISIONAL COURT.

THE QUEEN v. THE TORONTO RAILWAY COMPANY.

Corporation—Liability to summary conviction before justices—Service of summons — Street railway — Municipal by-law requiring enclosed vestibules upon cars—Cr. Code 562, 637, 853, 858.

1. The procedure of the Criminal Code of Canada as to summary convictions applies as well to corporations as to natural persons.
2. The fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment, does not prevent the application of the summary procedure in other respects to corporations.
3. Notice of a summons by justices under the Summary Convictions clauses of the Criminal Code may be given in a manner similar to a notice of indictment under Cr. Code 637.

ARGUED: December 12, 1898.

DECIDED: December 19, 1898.

This was an appeal by the defendants, the Toronto Railway Company, from an order of the Honorable Mr. Justice Rose refusing to grant an order to prohibit the further prosecution herein of the Toronto Railway Company by the corporation of the city of Toronto, before the police magistrate of the city, for an alleged breach of a by-law of the city of Toronto, upon the ground that the company could not by law be punished by summary conviction before a magistrate, but were punishable by indictment only.

The judgment of Rose, J., appealed from, was delivered on November 17th, 1898, as follows:

"By sec. 569 of the Municipal Act, R.S.O. ch. 223, subsec. 4, councils of cities are empowered to pass by-laws to compel electric railway companies operating within the limits of such city to provide "proper and sufficient and closed vestibules upon street cars," etc. Under the powers conferred

by such section, the city of Toronto, on September 24th, 1894, passed a by-law, number 3280, to compel every electric railway company operating within the limits of the city of Toronto to provide such vestibules in the manner provided by such by-law and as therein fully set forth. By clause 4 of such by-law it is enacted that any company guilty of a breach of the provisions of the by-law shall on conviction forfeit and pay a penalty and costs, to be levied by distress and sale of the goods and chattels of the offender in case of non-payment.

By section 705 of the Municipal Act, prosecutions for any offence against a municipal by-law may be had before a justice of the peace for the municipality where the offence was committed, and by such section it is provided that the justice may convict, award a penalty with costs, and cause such penalty and costs if not forthwith paid to be levied by distress and sale of the goods of the offender.

Clause 4 of the by-law is drawn under the provisions of such section. Section 706 of the statute provides for commitment in default of distress.

A summons has been issued against the Toronto Railway Company for an alleged offence against the by-law in question. That summons was served upon the manager and the secretary of the company. The company was incorporated by 55 Vict. ch. 99 (Ont.).

The provisions of the Criminal Code which were treated as in question here, were sections 562, 853 and 858.

Section 562 provides for service of a summons upon the person to whom it is directed, either by delivering it to him personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

The interpretation clause of the Code, sec. 3, sub-sec. (*l*), defines "person" to include all bodies corporate "in relation to such acts and things as they are capable of doing," etc.

Section 853 is as follows: "In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of

an offence punishable on summary conviction, then if it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully and effectually for all intents and purposes as if the defendant had personally appeared in obedience to such summons, or the justice may, if he thinks fit, issue his warrant as provided by section 560 of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended."

It is admitted by counsel that this offence complained of is not an indictable offence, that the procedure, if any, is that under the Summary Convictions clauses of the Code, and it is urged on behalf of the company that such clauses do not apply to a corporation and that there is no mode of procedure thereunder against a corporation, that the provisions of the section to which I have referred are clearly provisions applicable to persons not corporations.

In the first place it is pointed out that the summons must be personally served; that upon conviction, if a penalty is awarded, the offender may be committed to jail if he do not pay the penalty, and, generally, that it is clear that proceedings against a corporation were not provided for by the Code. It is also pointed out that under the Code provision has been made for proceeding against a corporation by indictment (see sections 635-639 inclusive), and it is urged that because it was necessary to provide specially for proceeding against a corporation by indictment, it would be necessary to provide a special procedure to bring a corporation within the Summary Convictions clauses of the Code.

There is no doubt, of course, that under the provisions of the Municipal Act, to which I have referred, it was intended that a corporation should obey and might be compelled to obey the provisions of the by-law which the Legislature empowered the municipality to pass. It must also be remembered that the same Legislature which empowered the municipality to pass a by-law to compel the corporation to obey its provisions, passed the Act of incorporation giving the defendant company an existence.

If the company may be served with process, there is no difficulty I think in working out the provisions of the statute, and I am of opinion upon the examination of the authorities, such as have been cited or I have found, that there is no difficulty in serving a corporation within the provisions of the statute.

In Glen's Summary Jurisdiction Acts, 6th ed., by Bodkin & Douglas, at p. 6, I find a statement of the law as understood by the authors of that work, and I think that the fair result of what is there written is that when service is required it may be effected in any manner known to the law without being specially provided for by statute, and if the effect of the provisions of the Municipal Act, to which I have referred, is that the defendant company is bound to observe its provisions or be proceeded against as an offender, then it seems to me that is in effect a declaration that such company may be served with process in any manner the process might be served upon the company in any proceeding either in a court of common law, or in a court of equity, or in a court for criminal cases only.

If the provisions of the interpretation clause are read into sub-sec. 2 of sec. 562 of the Code, such sub-section will read as follows: "Every such summons shall be served * * upon the body corporate, society or company to which it is directed by delivering it to the proper officer of such company personally." The remaining provision "or by leaving it for him at his last or most usual place of abode," of course is inapplicable to service upon a corporation.

In *Newby* v. *Colt's Patent Fire Arms Co.* (1872), L.R. 7 Q.B. 293, cited by Mr. Fullerton, I find Mr. Justice Blackburn stating the law to be as follows, at p. 296: "At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation," etc.

If service may be effected, I have not to determine whether the service has been proper here; that is a matter for the magistrate to consider when the case comes before him, in

the event of the corporation not appearing by counsel or agent in answer to the summons. Reference may also be had to the following authorities as throwing some light upon the point: *State* v. *Western North Carolina R. R. Co.* (1883), 89 N. C. R. 584; Tidd's Practice (1828), p. 121. If the corporation can be served, as I think it can, then it may or may not appear. If it do appear and plead, of course no further question can arise. If it do not appear, then the magistrate may proceed, under the provisions of section 853, to which I have referred, in which case the language of the authors of Glen's Summary Jurisdiction Acts, at p. 6, to which I have referred, is very applicable:

"An opinion is expressed in 16 J.P. 445, that justices may proceed *ex parte* upon proof of service in the mode pointed out in this section. The section applies in all cases where an information is laid or complaint made that any person has committed any offence or act within such justice's jurisdiction irrespective of whether any special provision is made as to particular mode of service of the summons in the Act under the provisions of which such information has been laid."

If upon non-appearance the magistrate elect to proceed to a judgment and awards a penalty, that penalty may be enforced by distress. I am aware that in deciding as I am doing, I am placing aside some of the provisions of the statute which can only be enforced against a person and not against a corporation; but the most that I think can be said as to that is that some of the provisions are applicable to persons only, and others are applicable to persons and corporations.

But it was urged that this case was concluded by authority, and I was referred to the case of *Regina* v. *Brennan*, (not reported) decided by a Divisional Court of which I was a member, in June, 1892, in which it was said that our court held that a conviction against an incorporated company could not be sustained, as there was no procedure for service of a summons upon a corporation. The case was argued on behalf of the defendant only, no one appearing for the Crown, and I find that the president of the company appeared with his

solicitor before the magistrate and tendered evidence which the magistrate refused to receive. It is not stated upon the material whether there was a formal plea entered for the defendant or not, and the contrary not being stated, I assume that the corporation did plead, otherwise I cannot understand why evidence should have been tendered on its behalf. It will be thus seen that on the material before the court the question as to there being any procedure for service of the corporation could not well arise. The information was under the Master and Servant Act (Ont.) Although the ground taken here was also taken there, I cannot say from recollection or from any note that I have made of the case that the judgment of the court proceeded upon such ground, and there being other and sufficient grounds for the judgment then given I consider myself free to express an opinion in this case irrespective of the judgment given in *Regina* v. *Brennan*.

The case of *Re Chapman and the Corporation of the City of London* (1890), 19 Ont. R. 33, was also cited as an authority conclusive and binding. But it is clear that the learned judge in that case was directing his observations to a case where the offence might be the subject of an indictment, and his language though somewhat general, must, I think, be read in view of the facts of that particular case, and I do not find myself therefore concluded by either the observations or the decision of my learned brother Robertson. Indeed, I am quite certain that he would feel himself perfectly at liberty to consider the case that is now before me without reference to the opinion that he expressed in such case.

The case of *Regina* v. *The T. Eaton Co.*, decided by myself on the 1st of August last, [*ante* p. 252] is not an authority in the defendants' favour. I rested my decision there solely upon the ground that the proceedings in that particular case should be by indictment. I referred to the *Chapman* case and to another case to which I shall presently refer, and concluded my judgment in the following words: "But I do not further examine that case as I rest my judgment upon the grounds stated."

The case to which I referred there was that of *Starcy* v.

The Chilworth Gunpowder Manufacturing Co. (1889), 17 Cox C.C. 55, which case I think affords support to the contention here on behalf of the prosecution. That case was sent back to the magistrate by a court composed of Lord Coleridge, C.J., and Mathew, J., on a proceeding against the company under the Summary Jurisdiction clauses. It was apparently taken for granted by counsel and by the court that the corporation might be proceeded against under the procedure in the Act provided for cases against persons. A summary of that statute had been made by counsel in the case before me and will be found among the papers, and it will be found, upon reference to such summary, or the statute itself, that there is no provision distinctly referring to a corporation. The Act was one to consolidate and amend the law relating to fraudulent marks on merchandise; and section 2 provided that every person who does certain specified things "shall be guilty of an offence against this Act." Section 5: "Every person guilty of an offence against this Act shall be liable on conviction on indictment to imprisonment," etc. The interpretation clause of the Act provided that "person" should include "any body of persons corporate or unincorporate."

It has been suggested that that case is distinguishable because the company in that case was incorporated under the "Companies Act, 1862," and sections 62 and 63 of that Act provide for the service of a summons, notice or other document upon the company. Apart from the question which has been raised by Mr. Fullerton as to whether such section as to service was enacted to govern the service of a summons of the nature of that we are now considering, I do not feel at all pressed by its presence in the Act referred to, for I think that apart from any special provision in the Act of incorporation of this company for service upon it, service may be made as I have pointed out. In other words, once conceding that the Legislature intended that the corporation should be subject to the provisions of the by-law and should be liable to be proceeded against for an offence against such by-law, then it seems to me it must follow that service of process upon such corporation may be effected in the mode in which any process

may be served upon the corporation apart from any statutory provision.

I think that the motion fails and must be dismissed with costs."

TORONTO, December 12th, 1898.

Bicknell, for the Toronto Railway Company, appellants, contended that sec. 703 of the Municipal Act, R.S.O. 1897, ch. 223, giving a council power to direct that on default of any person or corporation doing any matter or thing enjoined by by-law, such matter or thing shall be done at the expense of the person in default, is the only section in the Act which refers specifically to a corporation; but that sections 704 to 707, with regard to the recovery and enforcement of penalties, refer only to individuals: that R.S.O. ch. 90, sec. 2, embodies by reference the provisions of the Criminal Code, but that sections 562, 853, and 858 of the Code as to service of summonses, and what is to be done on default of appearance, do not apply to corpororations, on which personal service is impossible; that there is no provision in the Criminal Code for service of a summons on a corporation, though it does provide for the case of an indictment; sections 635-639; and a justice of the peace has no power and never had power to compel a corporation to appear in his court: *Re Chapman and the Corporation of the City of London* (1890), 19 Ont. R. 33.

Fullerton, Q.C., for the city of Toronto, respondents, contended that service could be made on the corporation, just as it could have been if it had been civil process instead of criminal; and that secs. 855 and 858 of the Criminal Code got over the difficulty: *Newby* v. *Colt's Patent Fire Arms Co.* (1872), L.R. 7 Q.B., at p. 296; Am. & Eng. Ency. of Law, 2nd ed., p. 115, n. 4; *State* v. *Western North Carolina R.R. Co.* (1883), 22 Am. and Eng. Railroad Cases 58, 89 N. Car. R. 584; *Queen* v. *Birmingham and Gloucester R.R. Co.* (1842), 3 Q.B., at p. 233; *Consumers' Gas Co.* v. *City of Toronto* (1896), 23 Ont. App. 551; *Regina* v. *Verral* (1889), 18 Ont. R. 117.

TORONTO, December 19, 1898.

The judgment of the court was delivered by

STREET, J.—

In my opinion we cannot interfere with the judgment appealed against. Sec. 569, sub-sec. 4 of the Municipal Act, R.S.O. 1897, ch. 223, gives power to the city council to pass a by-law requiring electric railway companies within the city limits to provide enclosed vestibules upon their cars for the protection of their employes. Section 702 authorizes the imposition by by-law of penalties for the breach of municipal by-laws, and section 703 provides for the enforcement and recovery of such penalties by summary proceedings before a justice of the peace.

The city council of Toronto have passed a by-law within the powers conferred upon them by sub-sec. 4 of sec. 569, and authorizing a penalty not exceeding $50, for each offence against the by-law, in the discretion of the magistrate. The corporation of the city of Toronto have now laid or caused to be laid an information charging the Toronto Railway Company with a breach of the by-law, and the company say that they cannot be proceeded against under the by-law because the provisions of the Criminal Code with regard to summary convictions are not applicable to corporations.

We have here a plain legislative authority for the imposition upon a corporation of a penalty in case of a breach by the corporation of a city by-law, and we should not allow the provision to be defeated upon any mere technicality unless compelled to do so. By chapter 90 of the Revised Statutes of Ontario, it is provided that where a penalty or punishment is imposed under the authority of any statute of the Province of Ontario and is recoverable before or may be inflicted by a justice of the peace, "the like proceedings and no other" may be had for the recovery of it, etc., as under the statutes of the Dominion of Canada might be had if the penalty had been imposed by a statute of the Dominion.

In effect we have a by-law imposing a penalty upon a corporation in pursuance of an Act authorizing such imposition and this Act providing that the remedies for the recovery of the penalty in question from the corporation are to be the same as those provided by the Criminal Code in regard to summary convictions for offences against its provisions.

The provisions contained in the Code afford the only means of enforcing convictions for breaches of municipal by-laws and there is no mode of enforcing convictions under such by-laws where the offenders are corporations unless it can be done under the provisions of the Code. It being clearly the intention of the Municipal Act to punish corporations in certain cases for breaches of municipal by-laws, I should be prepared to hold that the machinery provided by the Code must be applied to corporations as well as to natural persons for the purposes of the Municipal Act even though it were necessary for any reason to hold it to apply only to natural persons in regard to offences created by or coming within the scope of Dominion legislation.

There is, however, no reason, in my opinion, for holding that the Code does not apply in regard to offences punishable by summary conviction to corporations as well as to natural persons. By sub-sec. (*t*) of sec. 3, it is provided that "the expressions 'person,' 'owner' and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts, in relation to such acts and things as they are capable of doing and owning respectively."

This is perhaps only another way of stating as is stated in the general Interpretation Act, R.S.C. 1886, ch. 1, sub-sec. (22), that the expression "person" includes any body corporate or politic, etc., "to whom the context can apply according to the law of that part of Canada to which such context extends."

But taking the Code interpretation alone, we find the expression "every one," "no one," "no person," and "any person," used throughout the Code in a manner showing that "every one" means "every person," and "no one" means

"no person"; so that "one" in the Code, thus used, is an expression "of the same kind" as "person," and is subject to the same interpretation, viz., that it includes a corporation in relation to such acts as corporations are capable of doing, such, for instance, as committing offences under the clauses relating to the fraudulent marking of merchandise which are punishable in the alternative by indictment or on summary conviction.

The objection that the portion of the remedy provided for the recovery of the penalty and costs by way of imprisonment in default of sufficient distress, is inapplicable to corporations seems to me not entitled to weight because it is not a necessary part of the conviction that it should be applied. A similar objection urged by a corporation in *Rex* v. *Gardner*, 1 Cowp. 79, against its being rated for poor rates because the remedy by imprisonment upon failure of distress was impossible, was held not entitled to weight. See also *The Queen* v. *The Birmingham & Gloucester R. W. Co.* (1842), 3 Q.B. 223.

I have nothing to add to the answers contained in the judgment of my brother Rose to the objection that the Code contains no provision as to how a corporation is to be served with a summons. If we come to the conclusion that the Code was intended to provide for the summary conviction of corporations for offences, it will be the duty of the courts, in the absence of special directions as to the manner in which they are to be served with the summons, to see that it is properly brought to their notice. Section 637 of the Code shows what is considered proper service of notice of an indictment, and there is no reason why similar notice should not be good in the case of a summons.

In my opinion the conclusion at which my brother Rose arrived was right, and the appeal from it should be dismissed with costs.

Appeal dismissed.

Note: *Corporation—Summary proceedings against—Matter of jurisdiction or of procedure.*

The principal case emphasizes the distinction between matters of jurisdiction and of procedure. From the fact that the Summary Convictions clauses of the Code apply to corporations as well as to natural persons, as here decided, it is not to be inferred that corporations are included in all the provisions of the criminal law which declare an offence to be punishable by summary conviction. Most of the offences under the Criminal Code are in their nature personal, and, therefore, could not be applicable to corporations. Others which are applicable to corporations as well as to persons can be proceeded with only by indictment, and the corporation is not then subject to the process of "preliminary enquiry" before justices, but to the special provisions of secs. 635-639 of the Code. *Re Chapman* v. *City of London* (1890) 19 Ont. R. 33; *The Queen* v. *Eaton*, ante p. 252.

In the principal case the offence was under a provincial statute and was not indictable, and, unless the process of summary conviction generally applicable under the Ontario Summary Convictions Act could be applied, there would remain no way of enforcing the penalty.

The offences specified in Cr. Code secs. 451 and 452; of falsely representing goods as having been manufactured for the Government, and of unlawfully importing goods liable to forfeiture under the trade-mark law would appear to be examples of Code offences for which a corporation *must* be proceeded against under the Summary Convictions clauses. But for the offence declared by Cr. Code 448 of selling goods to which a false trade description has been applied, provision is made by sec. 450 for punishment: (*a*) upon indictment, by imprisonment or fine, or both; (*b*) upon summary conviction, by imprisonment or fine; and it was held that under that section a justice has no summary jurisdiction against a corporation, and that the intention to be inferred from such an alternative provision is that where the accused is a corporation, the only authorized procedure is that of indictment. *The Queen* v. *Eaton*, 2 Can. Cr. Cas. 252.

[SUPREME COURT OF NEW BRUNSWICK.]

Ex parte CASSON.

Conviction—Imprisonment in default of paying fine—Award of distress not imperative — Canada Temperance Act—Cr. Code 872 (b).

1. A conviction under the Canada Temperance Act may by virtue of Cr. Code sec. 872 *(b)* direct imprisonment in default of payment of the fine and costs, without any award of a distress upon the defendant's goods.

This was an application to remove into this court by way of certiorari, a conviction made against the applicant, Walter S. Casson, by the Police Magistrate of Moncton, for unlawfully selling liquor contrary to the provisions of the second part of the Canada Temperance Act. The only ground relied on was, that the conviction adjudged the defendant to pay a fine and costs forthwith, and in default of payment to be imprisoned for eighty-five days, but did not adjudge that in default of sufficient distress he should be imprisoned.

FREDERICTON, N.B., November 3, 1897.

W. B. Chandler and *D. J. Welch* showed cause.
D. Grant and *H. C. Hannington* supported the motion.

FREDERICTON, November 12, 1897.

The judgment of the court was delivered by

VAN WART, J.—

This is an application for a writ of certiorari to remove into this court a conviction made by and before the Police Magistrate at Moncton, against the applicant, on the 23rd of September last, for unlawfully selling intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act. The conviction adjudged the applicant to pay a fine and costs forthwith, and in default of payment

imprisonment for eighty-five days unless fine and costs were sooner paid. The only ground relied on was, that in default of payment of the fine and costs forthwith, the conviction should have adjudged the fine and costs to be levied by distress, and for want of sufficient distress, and for want only could the imprisonment be adjudged.

Regina v. *Sullivan*, 24 N.B. R. 149, was relied upon in support of this contention. No doubt this case has been approved of and followed many times and is an authority for and fully supports the contention made, if there has been no change in the statute since it was decided. The prosecution rely upon s. 872 of the Criminal Code of Canada as having altered the law since the decision in *Regina* v. *Sullivan*, so that the magistrate or convicting justice may award imprisonment in default of payment of a penalty without awarding a levying by distress.

Section 872 enacts that "whenever a conviction adjudges a pecuniary penalty or compensation to be paid.....whether the Act or law authorizing such conviction.....does or does not provide a mode of levying or raising the penalty.....or of enforcing the payment thereof, the justice by his conviction .....after adjudging payment of such penalty.....with or without costs, may order and adjudge— .....

"*(b.)* That in default of payment of the said penalty .....and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the common gaol or other prison of the said territorial division in the manner and for the time mentioned in the said act or law, or for any period not exceeding three months, if the act or law authorizing the conviction.....does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums with the like costs and expenses are sooner paid."

I think this provision alters the law, and under it the convicting justice was fully empowered to make the adjudication he did, and that the conviction is good in form.

The order nisi should be discharged.

Order discharged.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE, MEAGHER AND HENRY, JJ.

THE QUEEN v. SARAH SMITH.

Conviction for using profane language—Omission to set out the words complained of—Uncertainty—Costs of motion for writ of certiorari—Nova Scotia Crown Rules.

1. A conviction for using profane language on a public street is invalid unless the words complained of are therein set out.
2. In Nova Scotia, if the magistrate and the informant appear upon and unsuccessfully oppose an application for a writ of certiorari to remove a conviction, they may be ordered to pay the costs of the motion in the event of the conviction being quashed.

ARGUED: December 16, 1898.

DECIDED: January 14, 1899.

The defendant was convicted by the stipendiary magistrate of the City of Halifax, on the 20th day of June, A.D. 1898, in the police court of said city, for that she "in the said City of Halifax, on the 11th day of May, A.D. 1898, being on one of the public streets of the said City of Halifax, did openly use profane language." The words complained of, and upon which the conviction was founded, were not set out in the summons, information, or conviction.

The conviction was brought up by writ of certiorari, granted by McDonald, C.J., the motion for which had been opposed by counsel for the magistrate and for the police officer who had laid the information, and the learned judge directed that the costs of the motion abide the event of the proceedings to quash the conviction.

On December 12th, 1898, *J. J. Power* moved to quash the conviction, information and summons on the ground that they did not set out the words upon which the conviction was founded, citing *Re Donnelly*, 30 U.C.C.P.; *Queen* v. *Bradlaugh*, 3 Q.B.D., 607; R.S.N.S. (5th Series) Appendix A., p. 27, s. 11; *Queen* v. *Spain*, 18 Ont. R., 385.

The Court made an order quashing the conviction on the ground taken.

HALIFAX, N.S., December 16, 1898.

W. F. McCoy, Q.C., moved, on leave granted, to set aside the portion of the order of McDonald, C.J., allowing the writ of certiorari, by which costs were given against the stipendiary magistrate and the informant, who had opposed the application for the writ. It is no part of the policeman's duty to make out the information. N.S. Acts, 1893, c. 52, s. 1. Costs are never given against either a public or private prosecutor unless the prosecutor misconducts himself. *Queen* v. *McLeod*, 30 N.S.R. 191; Paley on Convictions, 7th ed., p. 379; *Queen* v. *Coulson*, (Ont.) 1 Can. Cr. Cas., 114. (RITCHIE, J., referred to Crown Rule 34). The question is whether the Crown rules apply to a public officer whose duty it is to lay the information. (MCDONALD, C.J.—Why did the policeman oppose the motion?)

J. J. Power, contra: The Chief Justice having exercised his discretion as to costs, his judgment will not be reviewed. *Re Walter Murphy*, 28 N.S.R., 196. The party who makes the affidavit is *prima facie* the party who opposes the motion. N.S. Acts, 1893, c. 52, s. 1, only relates to laws enacted pursuant to the city charter. This information is not under the city charter. The ordinance does not provide for profane language. If the prosecution was under the charter the information must refer to the by-law or ordinance under which the prosecution is had. N.S. Acts, 1893, c. 27, s. 46.

HALIFAX, January 14, 1899.

The judgment of a majority of the Court was delivered by

RITCHIE, J.—

Mr. Power, on behalf of Sarah Smith, applied to the learned Chief Justice for a writ of certiorari to remove into this court a conviction made against her by the stipendiary

magistrate of the City of Halifax, notice having been given to him and to the informant. Mr. McCoy, Q.C., opposed the motion on behalf of the magistrate and informant, and an order passed for the issue of the writ, the costs of the motion to abide the event. After the conviction had been removed into this court, it was quashed by order of the court. The counsel for the accused claimed the costs of the motion for the certiorari under the order of the Chief Justice, the conviction having been quashed. This was opposed by Mr. McCoy, who obtained leave to appeal from the order of the Chief Justice in relation to the costs.

Rule 34 of the Supreme Court Rules (crown side), provides for the costs in such cases, and the magistrate and informant could have avoided all liability for costs by not opposing the granting of the writ of certiorari. But, instead of taking that course, they opposed the motion, taking the risk of having to pay costs, if unsuccessful ; and as the order was granted notwithstanding the opposition, I can see no reason why they should not pay them.

Besides this, by rule 191, costs are to be paid by the unsuccessful party, unless the court or a judge shall otherwise order. And such costs are always in the discretion of the judge. In this case the judge followed the ordinary rule, and directed them to be paid by the unsuccessful party, and there does not seem to be any reason whatever for reviewing his discretion.

The informant, in this case, is a policeman, and it was urged that the police would be deterred from doing their duty, if made liable for costs in proceedings like these. But it must be remembered that the liability for costs arises solely from the action of the informant and magistrate, and if they had not appeared and opposed the application, which they were not obliged to do, they would have been exempt from all liability for costs.

In my opinion, the accused is entitled to the costs of the application for the writ of certiorari, to be paid by George H. Fielding, Esq., the stipendiary magistrate, and Willoughby Mosher, the informant.

MEAGHER, J.—

In my opinion, the costs should be limited to the costs occasioned by opposing the motion at chambers. If it had not been for the opposition at chambers, no costs would have occasioned.

Motion refused.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE RICHARDSON, J., ROULEAU, WETMORE AND SCOTT, JJ.

THE QUEEN v. MONAGHAN.

Indian Act — Summary conviction — Giving and selling liquor—Two offences—Stated case—Judgment on — Subsequent motion to quash conviction—Res judicata — Necessity for certiorari — Cr. Code 801, 879, 888, 900.

1. Per SCOTT and ROULEAU, JJ.—A conviction returned by justices in compliance with a statutory requirement to the office of a superior court is regularly before the court and can be dealt with on a motion to quash, without the necessity of a writ of certiorari.
2. Per RICHARDSON and WETMORE, JJ.—The conviction was not regularly before the court, and a writ of certiorari to bring it before the court was necessary before a motion to quash the conviction could be properly entertained.
3. *Per Curiam.*—The grounds taken on the motion to quash the conviction being the same as those taken and disposed of by a single judge on a stated case, the matter was res judicata.

DECIDED: December 8, 1897.

The defendant had been charged on information and convicted under the Indian Act, R.S.C. (1886) c. 43, s. 94, for that he did "give and sell" to an Indian intoxicating liquor, etc. That section provides as follows: "Everyone who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, any intoxicant, or causes or

procures the same to be done, or attempts the same or connives thereat, or opens or keeps, or causes to be opened or kept, on any reserve or special reserve, a tavern, house or building in which any intoxicant is sold, bartered, exchanged or given, or who is found in possession of any intoxicant in the house, tent, wigwam or place of abode of any Indian or non-treaty Indian, or of any person, or upon any other part of the reserve or special reserve, or who sells, exchanges with, barters, supplies or gives to any person, on any reserve or special reserve, any intoxicant, shall, on summary conviction before any judge, police magistrate, stipendiary magistrate or two justices of the peace, or Indian agent, upon the evidence of one credible witness, other than the informer or prosecutor,—or in the Province of Manitoba, the Province of British Columbia, the North-West Territories or the District of Keewatin, upon the evidence of the informer alone, if he is a credible person,—be liable to imprisonment for a term not exceeding six months and not less than one month, with or without hard labor, or to a penalty not exceeding three hundred dollars and not less than fifty dollars, with costs of prosecution, a moiety of which penalty shall belong to the informer or prosecutor, and the other moiety whereof shall belong to Her Majesty, to form part of the fund for the benefit of that body of Indians or non-treaty Indians, with respect to one or more members of which the offence was committed, or he shall be liable to both penalty and imprisonment in the discretion of the convicting judge, magistrate, or justices of the peace or Indian agent."

At the close of the evidence, the defendant's counsel objected that two offences were charged. After consideration, the magistrates drew up the conviction as above, finding the accused guilty of giving and selling liquor. The defendant thereupon applied for, and obtained, a stated case under s. 900 of the Criminal Code, which was heard before Scott, J., who held that to give and sell were not two offences, and affirmed the conviction.

The magistrates having transmitted the conviction and proceedings to the Clerk of the Court at Macleod, under

s. 801 of the Criminal Code, the defendant applied for, and obtained from a single judge, a rule nisi, returnable before the Full Court at Regina, to quash the conviction, on the same grounds as were taken on the stated case, and a direction was given to the Clerk at Macleod to transmit the conviction to the Registrar of the Court at Regina, which he did.

Costigan, Q.C., for the defendant.
Muir, Q.C., for the magistrates and the prosecutor.

REGINA, N.W.T., December 8, 1897.
SCOTT, J.—

On the 20th November, 1897, the defendant obtained from Rouleau, J., a rule nisi returnable before the court in banc calling upon the convicting justices to show cause why a certain conviction made by them against the defendant should not be quashed. On the return of the rule the objection was raised on behalf of the prosecution that the conviction was not properly before the court inasmuch as it had not been brought before it by certiorari. By the affidavits filed on the application for the rule it appears that the formal conviction drawn up by the justices was returned into this court together with the complete record of all the proceedings in connection therewith and that the same are now on file in the office of the Clerk of the Court for the Judicial District of Southern Alberta. There is nothing in the material filed on the application to show for what purpose they were so returned.

By section 888 of the Criminal Code it is provided that every justice before whom a person is summarily convicted shall transmit the conviction or order to the court to which an appeal is given before the time when an appeal from such conviction may be heard, there to be kept by the proper officer among the records of the court; and, by section 879, the court to which an appeal is given is a Judge of the Supreme Court sitting without a jury at the place where the cause of the information or complaint arose or the nearest place thereto where a court is appointed to be held.

By the information it appears that the clerk of the court to which the conviction and proceedings were returned by the justices is the Clerk to whom the same should have been returned under section 888, and, as nothing appears to the contrary, it may reasonably be presumed that they were returned to him under the provisions of that section. At all events, they might have been returned to and be properly on the files of the court under the provisions of that section.

Paley (On Convictions) defines a writ of certiorari as a writ which the Queen's Bench Division, by virtue of its superintending authority over all courts of inferior criminal jurisdiction in the kingdom, has power to award for the purpose of procuring an inspection of their proceedings.

In Short & Mellor's Crown Practice, page 89, it is defined as a process under which the Queen's Bench Division, by virtue of its superintending power already referred to, requires the judges or officers of such jurisdiction to certify or send proceedings before them into the Queen's Bench Division whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than can be done by the court below.

Although the intention of section 888 of the Criminal Code appears to be that the conviction shall be returned to the court in order that it shall be before it in case an appeal is taken from it, yet, as it provides that it shall be kept by the proper officer among the records of the court, I see no reason why it should not be treated as being properly on the files of the court for other purposes than those of appeal.

In my view the writ of certiorari is merely a means to attain an end which had already been attained when the conviction was brought into court under section 888.

In England and in Ontario the writ is necessary because the conviction cannot be brought before the court by any other means, but it appears to me that in the Territories when the conviction has been returned to the court under section 888, the issue of a writ of certiorari to bring into

court something that is already here is an entirely unnecessary proceeding.

In *Regina* v. *Whelan* 45 U.C.R. 396 it was held that a conviction once regularly brought into and put upon the files of the court is there for all purposes. In that case Armour, J., states: "It is the fact of the conviction being on the file of this court regularly brought there that gives the right to move to quash it; how or at whose instance it was brought there so long as it was brought there regularly cannot in my opinion affect that right." He also agrees with the view expressed by Wilson, J., in *Regina* v. *Levecque* 30 U.C.R. 509 to the effect that the court might still be obliged to consider the conviction as upon a certiorari issued at common law if the conviction were found in court, however brought there, so long as it was regularly there, and that as the conviction was in fact in court, it might be moved against.

In that case Armour, J. points out the clear distinction which exists between the points involved in that case and that involved in *Regina* v. *McAllan* 45 U.C.R. 402 cited on the argument in this case, namely, that in the latter case the conviction was not regularly brought into court.

It may be urged that in case the issue of a writ of certiorari were held to be unnecessary, justices and prosecutors would be deprived of certain safeguards and privileges which exist in cases where the issue of such a writ is necessary, but if such is the case I cannot see that it affects the question. It can only be said that Parliament in so legislating as to do away with the necessity for the issue of the writ has omitted to provide for those safeguards and privileges. I cannot accept the view that the issue of the writ is still necessary merely because the opposite view would result in their being done away with.

It appears upon this application, that, after the making of the conviction, the justices at the request of the defendant and under the provisions of section 900 of the Criminal Code and the rules made thereunder, stated a case for the opinion of a judge of this court in which the legality of the conviction

was questioned upon substantially the same grounds as those upon which it is now questioned, and it is now contended on behalf of the prosecutor, that, as the judge to whom the case was stated sustained the conviction, the matter is now res judicata.

Sub-section 9 of section 900 provides that the authority and jurisdiction thereby vested in the court for the opinion of which a case is stated, may, subject to any rules and orders of court in relation thereto, be exercised by a judge of such court sitting in chambers, and Rule No. 24 of the rules of this court provides that the application for a case stated shall state whether the appeal is to be to the court in banc or to a single judge and in the latter case naming the judge.

The present application is to all intents and purposes an appeal from a single judge upon a case stated and no such appeal appears to be contemplated by the provisions of the Criminal Code or the Rules of Court. Even though it may not, strictly speaking, be a proceeding by way of appeal, yet I think that as the defendant elected to submit the questions involved to the decision of a single judge instead of to the court in banc, he should not now be permitted to question the conviction before this court upon those grounds.

ROULEAU, J., concurred.

RICHARDSON, J.—

I concur with the latter portion of the judgment of my brother Scott as to res judicata, that, having elected as he did, there is no appeal further, and on consideration we have determined that this is a proper case in which costs should be allowed on the order made.

WETMORE, J.—

I concur with the views of my brother Richardson that this court has no jurisdiction to entertain this matter until the conviction is properly brought before the court by virtue of a writ of certiorari. This court has all the jurisdiction

which was held by the old Courts of Common Law and Equity at Westminster in addition to what jurisdiction has been conferred upon it by statutory enactments. In exercising that jurisdiction, however, and in order that the court may become seised of the special subject matter it must be brought before the court either by the method prescribed by the common law practice of the court, or by statutory enactments. Now this court or a judge of this court, has no right in my opinion to prescribe a procedure apart from the procedure so prescribed by the common law or by statute; and I think that to bring this matter under the notice of the court in the way it is sought to be done to-day is practically to prescribe a new procedure and is virtually, in my opinion, legislating.

So far as the jurisdiction of this court is concerned in respect to reviewing the decisions of magistrates, there are so far as I can discover only three methods of doing it; one is a statutory procedure which gives the right so far as the Territories are concerned of appealing to a judge sitting without a jury, another provides for a case to be stated by the magistrate with which this court or a single judge may deal according as the person moving in the case elects, and the other method is by certiorari. Section 888 of the code authorizes and directs the magistrate making the conviction to forward it to the officer of the court to whom the statutory appeal has been given. It is only forwarded to that officer of the court, however, for the purpose and with the view to that appeal, and when we desire to get possessed of the jurisdiction to deal with it by way of certiorari the process of the court must be issued in the form prescribed, and after that there must be a return under the seal of the magistrate and then we have—and only then—the record with which the court can deal with the conviction by proceeding to quash.

The conviction which is filed with the clerk under section 888 is not the record in the sense in which the return to a writ of certiorari is the record, and moreover we do not get before us by the filing of the conviction what is necessary in

most instances to dispose of the questions raised on certiorari because it is necessary to have the evidence, and this court has decided already that the writ of certiorari must require a return including the conviction and the evidence, and there is no provision in the Act which directs the evidence to be filed with the clerk of the court. It turns out that the evidence is here, but how did it get here, and what record or certificate have we that this is the evidence taken before the magistrates?

Now the departing from this rule, I think, has the effect of doing away with some express enactments and decisions affecting the question. For instance, if the writ of certiorari is applied for, before the writ can be issued at all the justices have the right to a notice, that is by virtue of an Imperial statutory enactment of binding force in these territories. Now how is it possible for us by creating procedure of our own, entirely original, to avoid the provisions of that Act? In this case it was attempted to be done by giving notice to the justices that an application would be made to a judge, not for a writ of certiorari, but for a rule nisi to quash. The act does not provide for a notice to be given to the justices of an application for an order to quash, but of an application for a writ of certiorari, and when a notice is given as has been given in this case of an intention to apply for an order to quash the conviction, the provisions of the statute are not being carried out at all, but it is a doing something entirely different to what the statute contemplates.

Then again as to the consequences; under the prescribed practice whereby a writ of certiorari is issued, the justices may at any time before the return of the writ of certiorari, before they send back into court the conviction under the writ, amend it, and they may do that even after it is lodged with the officer of the court. Here a statutory appeal has been given, and the justice cannot do that if he is made to return the conviction without a writ of certiorari, his power is gone if this practice is allowable, it simply means that a procedure can be taken under which he is liable to the same consequences as if the conviction had been returned to the

writ of certiorari. Now, if this is so, it must follow that the very moment that under section 888 the conviction is filed, the justice has no longer a power to amend, if it is in the same position as if filed with a return to a writ of certiorari, because the moment he has filed the record in court it is open to any person to move to quash it. But the authorities run the contrary to that, they say he can amend it before it is returned with the return to the writ of certiorari. It seems to me, therefore, that establishing a practice such as is sought to be carried out here is flying in the teeth of the practice of the court and the Imperial Statute to which I have referred and the decisions I have mentioned.

I think, therefore, with my brother Richardson that we have no jurisdiction to entertain this application until a writ of certiorari has been issued and the return made to the court; but I concur with the latter part of my brother Scott's judgment, that the defendant having elected to take the case stated before a single judge as he had done, and having got the decision of that judge, he cannot come before this court now and attack the conviction upon the very same grounds on which he attacked it before the single judge. The powers of both are identical. Suppose instead of electing to have this case heard before the single judge he had elected to have it heard before this court and got its decision, could he turn around then and apply to this court to quash this conviction just as if it had been brought to this court by writ of certiorari? I think it is a case of res judicata, and no appeal seems to be given to this court from the decision of a single judge, and I do not think we should allow it to be taken in a side way.

Rule discharged.

Note: *Res judicata in criminal matters.*

It is a general principle that a decision by a court of competent jurisdiction, of matters put in issue by the pleadings, is binding and conclusive upon all other courts of concurrent power in the same jurisdiction, and between parties and their privies.

Note—*Continued.*

When a competent tribunal, having had a case before them, have given a final judgment, it is *res judicata*. The object of the rule is always put upon two grounds—the one, public policy, that it is the interest of the State that there should be an end of litigation; and the other, the hardship on the individual that he should be vexed twice for the same cause. *Lockyer* v. *Ferryman* (1877) L.R. 2 App. Cas. 519, 528, 530, per Lord Blackburn.

A judicial decision is conclusive until reversed, and its verity cannot be contradicted; *res judicata pro veritate accipitur.*

But the prior decision does not prevent the court from considering matters which have arisen subsequently. *Heath* v. *Overseers of Weaverham* (1894) 2 Q.B. 108.

There must in civil actions be a concurrence of the four conditions following:—

(1) Identity in the thing sued for.

(2) Identity of the cause of action.

(3) Identity of persons and of parties to the action.

(4) Identity of the quality in the persons for or against whom the claim is made.

The same rules are adhered to in criminal proceedings as in civil suits so far as they are applicable. The issue must be the same to create a bar; a charge of doing an act with criminal intent is not considered the same as committing the same act without such intent; *Com.* v. *Bakeman*, 105 Mass. 53.

There may be great similarity in the *facts* where there is a substantial legal difference in the nature of the *crime*; and on the contrary, there may be considerable diversity of circumstances where the legal character of the offence is the same; as where most of the facts are identical but, by adding withdrawing or changing some one fact, the nature of the crime is changed, as where one burglary is charged as a burglariously breaking and stealing certain goods, and another as a burglarious breaking with intent to steal; these are distinct offences. So, on the other hand, where there is a diversity

Note—*Continued.*

of circumstances such as time and place, where time and place are not necessary ingredients in the crime, still the offences are to be regarded as the same. *Com.* v. *Roby*, 12 Pick. (Mass.) 503, per Shaw, C.J.

For the operation of the rule of *res judicata* it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus, an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder, for, in the first instance, had the defendant been guilty not of murder but of manslaughter, he might be found guilty of the latter offence upon that indictment; and, in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarged into murder. *State* v. *Wister*, 62 Mo. 592; *Com.* v. *Roby*, 12 Pick. (Mass.) 503.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J.,

THE QUEEN v. CORBETT.

Warrant of commitment—Stating costs of conveying to gaol—Habeas corpus—Inland Revenue Act (Can.) —Illicit distilling.

1. Where a conviction is made under the Inland Revenue Act (Can.), and a money penalty is imposed and in default imprisonment for a fixed term unless the penalty and the costs and charges of conveying the accused to gaol are sooner paid, it is necessary that the amount of the latter costs and charges should be stated in the warrant of commitment (Inland Revenue Act s. 113); and where not so stated the prisoner is entitled to be discharged on habeas corpus.

DECIDED: June 17, 1899.

The prisoner was in custody under a warrant issued on a conviction for violation of the Inland Revenue Act, R.S.C. 1886, Ch. 34, sec. 159, sub-sec. (*e*). The conviction as set out in the warrant of commitment, after reciting the offence in the language of the section, adjudged that the accused for his offence forfeit and pay the sum of one hundred dollars to be paid and applied according to law and also adjudged that he be imprisoned in the common gaol of the county for the term of one month without hard labor, and that he pay M. A. McDonald (who was not designated the prosecutor) the sum of ten dollars for his costs in that behalf, and if the said several sums were not paid forthwith that he be imprisoned for a term of four months to commence at the expiration of the first term, unless the said sums and "the costs and charges of conveying the accused to gaol were sooner paid."

Section 113 of the Inland Revenue Act provides as follows: "Every penalty or forfeiture incurred for any offence against the provisions of this Act or any other law relating to excise, may be sued for and recovered or may be enforced before any court of Vice-Admiralty, or any court of record having

jurisdiction in the premises, or, if the amount or value of such penalty or forfeiture does not exceed five hundred dollars, the same, whether the offence in respect of which it has been incurred is declared by this Act to be a misdemeanor or not, may be sued for and recovered or may be enforced before a judge of a county court, or before a police or stipendiary magistrate, or any two justices of the peace having jurisdiction in the place where the cause of the prosecution arises, or wherein the defendant is served with process, under the "*Act respecting summary proceedings before justices of the peace*," by whom the complaint against the offenders shall be dealt with, on the oath of one credible witness; and any such penalty may, if not forthwith paid, be levied by distress and sale of the goods and chattels of the offender, under the warrant of the court, judge, magistrate or justices having cognizance of the case; or the said court, judge, magistrate or justices may, in its or their discretion, commit the offender to the common gaol for the period of six months, unless the penalty and costs, *including those of conveying the offender to such gaol and stated in the warrant of committal*, are sooner paid."

J. A. Chisholm for the prisoner: The offence is not described with certainty and more than one offence is set out. The name of the prosecutor ought to be given. The term of imprisonment in default of payment is fixed at six months. Inland Revenue Act sec. 113. A shorter term cannot be imposed. The amount of the costs of conveying to gaol must be inserted in the warrant, sec. 113.

F. F. Mathers for the prosecutor: The offence is sufficiently described. *Queen* v. *Crowell*, 2 Can. Cr. Cases p. 34; Criminal Code sec. 907. A shorter term may be imposed. Criminal Code sec. 953; *Queen* v. *Robidoux*, 2 Can. Cr. Cases 19.

HALIFAX, N.S., June 17, 1899.

GRAHAM, E.J.—

This is an application to discharge one Corbett who has

been committed by justices for a violation of the Inland Revenue Act. The commitment is attacked on several grounds. But there is one which I think is fatal. By the 113th section it is implied that the costs including those of conveying the offender to gaol shall be stated in the warrant of commitment. The costs and charges of conveying the defendant to gaol are imposed but the amount is not specified in the warrant. In my opinion the defendant should be discharged on the terms that no action shall be brought by him in consequence of his prosecution or imprisonment.

Prisoner discharged.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE McCOLL, C.J., WALKEM, IRVING AND MARTIN, JJ.

THE QUEEN v. SONYER.

Confession—Obtaining by holding out hope of clemency—Evidence admitted and afterwards struck out—Trial Judge reversing his ruling—Discharge of jury—Impanelling new jury—New trial—Cr. Code, 746.

1. Where an alleged confession is received in evidence after objection by the accused, and the trial judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impaneled.
2. If the trial judge refuses to impanel a new jury in such a case, a new trial will be ordered by a Court of Appeal.
3. On the motion before the Court of Appeal for a new trial the court will not determine the question of the admissibility of the alleged confession.

DECIDED: November 10, 1898.

This was an application on behalf of the prisoner by way of appeal and for a new trial.

The prisoner, an Indian, was tried at Nanaimo, B.C. Assizes on the 3rd, 4th, and 5th days of May, 1898, Harrison, County Court Judge, presiding, on three counts: (1)

Wounding with intent to murder; (2) wounding with intent to do grievous bodily harm; (3) wounding unlawfully.

The jury found a verdict of guilty on the first count, and the prisoner was sentenced to imprisonment for life. On the second day of the trial the Crown introduced evidence of seven alleged confessions which the prisoner had at different times made to police constables. The exact nature of these confessions is not material to this application. Counsel for the prisoner objected to all of these alleged confessions going in evidence, but the learned Judge allowed them all. The following day, i.e., the third day of the trial, when the case was called the learned Judge stated to the jury that having more fully considered the objections raised by counsel to the admission of the alleged confessions, he had come to the conclusion that four of the alleged confessions had been improperly received, as upon the authorities cited it was apparent these statements had been obtained from the prisoner by holding out to him hope of clemency. He thereupon struck out of his notes the evidence of the four alleged confessions, which he now proposed to reject, and directed the jury to wholly disregard these confessions. H. Simpson, counsel for the prisoner, then applied to the Judge to discharge the jury and impanel a new jury to try the prisoner, upon the ground that the jury having heard the improperly received evidence, could not be expected to possess that free and unbiased mind necessary to a fair and impartial verdict. The Judge refused to discharge the jury, and refused to reserve a case for the Court of Appeal, and the present application is made by leave of the Attorney-General and of the Full Court.

VICTORIA, B.C., November 10, 1898.

H. D. Helmcken, Q.C., and *Geo. A. Stewart Potts* for the prisoner: The improper evidence having been heard by the jury, the mere direction of the trial Judge that it was to be wholly disregarded could not remove from the minds of the jury the effect produced by it so as to leave the jury unprejudiced and unbiased, and this being the case, the jury

should have been discharged and a fresh jury impaneled. This is the course suggested in Russell on Crimes, 6th ed., vol. iii., p. 537, citing *R.* v. *Garner*, 1 Den. C.C. 329, and 2 C. & K. 920, "Where a jury have heard a confession proved which afterwards turned out to have been improperly obtained, the prisoner can hardly in any case be fairly tried, however much the Judge may endeavor to induce the jury to throw the confession out of their consideration, and it deserves consideration whether in order to prevent the injury which might thus arise to a prisoner, the Judge would not be well warranted in discharging the jury in order that the prisoner might be tried by another jury." See also *R.* v. *Rose*, 67 L. J. Q. B. 289, where the court in a somewhat similar case suggested that the jury should be discharged.

Hon. Joseph Martin, A. G., for the Crown, contra, opposed the motion and asked the court to hear argument as to whether under the circumstances the alleged confessions were not properly received in the first instance.

The judgment of the Court was delivered by

McColl, C. J.—

The judge should have discharged the jury and impaneled a fresh jury. The conviction must be quashed and a new trial had. This court cannot now determine the questions as to the admissibility of the alleged confessions.

New trial ordered.

The new trial took place at the spring Assizes at Victoria, B.C., before Martin, J., when the prisoner was acquitted.

Note: *Confession—Admissibility.*

See *The Queen* v. *Jackson*, ante p. 149, and Note at pp. 150—153 ante, where the case of *R.* v. *Rose* (1898) 67 L. J. Q.B. 289, cited in the above judgment is summarized.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J.

QUEEN v. THOMAS McDONALD.

Habeas Corpus—Costs—Customs Act (Can.)—Smuggling—Commitment—Cr. Code 872—Code form GGG.

1. A warrant of commitment by justices in default of payment of a fine imposed under the Customs Act for smuggling, and under which the accused is required to pay also the expenses of being conveyed to gaol before he can obtain his liberty, is invalid if the amount of such expenses are not stated therein.
2. A conviction under sec. 192 of the Customs Act (Can.), for clandestinely landing spirits in Canada should show on its face that the goods were subject to duty.

DECIDED: October 15, 1898.

The prisoner was arrested under a warrant of commitment issued on a conviction for violation of The Customs Act, R.S.C., c. 32, sec. 192, in default of payment of a fine. The conviction as set out in the warrant did not state that the spirits clandestinely landed in Canada were subject to duty, nor were the expenses of conveying to gaol fixed in the warrant.

Application for his discharge was made under chapter 117 R.S.N.S., 5th series, "Of securing the liberty of the subject," and counsel asked for costs of the application.

HALIFAX, N.S., October 15, 1898.

Gregory, for prisoner.
Mathers, for the Crown.

GRAHAM, E. J.—

I think that the decisions require me to hold that the warrant of commitment is invalid because the amount of the expense of conveying the defendant to gaol is not fixed in the instrument. I also think it should not be left to inference that the article clandestinely landed in Canada was

subject to duty. The defendant will be discharged upon the terms of bringing no action in respect to his imprisonment. No costs can be given under the statutes under which the application is made.

Order for discharge.

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WURTELE, J.

THE QUEEN v. LÉTANG.

False pretences—Debtor receiving rent after judicial abandonment—Insolvency proceedings terminating authority—Pretence by conduct—Reserved case—Cr. Code 358, 359, 743.

1. A charge of obtaining money under false pretences may be supported by showing a false pretence by the conduct and acts of the accused, and such pretence need not be in words or writing.
2. A debtor who has made a judicial abandonment for the benefit of his creditors whereby his property becomes vested in another, and who, knowing that he no longer had any right to receive the rent, presents himself afterwards as landlord to a tenant of the property, and receives the rent as he had formerly been accustomed to do, is guilty of a false pretence by his acts and conduct.
3. A reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a Court of Appeal.
4. Per *Court of Appeal*—The question whether the facts disclosed in a case constitute the crime of obtaining money by conduct amounting to false pretences, is not a question of law but an issue of fact within the province of a jury and cannot be made the subject of a reserved case.

MONTREAL, March 20, 1899.

Calixte Louis Létang was indicted for having on the 5th day of December last, at the city of Montreal, obtained by false pretences, from Léon Privé, the sum of $12, with intent to defraud, and he pleaded not guilty. He was tried on the 10th day of March instant and found guilty.

The accused and his brother Anselme Létang acquired from the widow of the late Prudent Jalbert, by deed of sale of the 24th day of September, 1897, among other properties, a house situated in the city of Montreal, bearing the civic number 149 of Sanguinet Street. On the 4th day of June last, the accused and his brother Anselme Létang, who were partners in trade, made a judicial abandonment of their property for the benefit of their creditors, and on the 13th day of the same month, Charles Alfred Sylvestre was appointed curator to the property of the insolvents. From the date of the judicial abandonment, the insolvents were deprived of the enjoyment of the house which they had purchased from Mrs. Jalbert. The accused occupied a flat in another of the properties abandoned by the firm. He proposed to the curator that he should be allowed to continue in the occupation of this property, in consideration of the services to be rendered by him in collecting the rents of the houses belonging to the estate of the insolvents, and the curator verbally accepted this offer. The accused thereupon collected from different tenants the amount of $2,724, but he only paid over to the curator the sum of $1,368, leaving a balance of $1,354. The curator, being dissatisfied, revoked on the 16th day of November last, the mandate which he had given to the accused for the collection of the rents due to the estate of the insolvents, and at the same time, his attorneys demanded the immediate payment of the balance of the collections which he had made, and notified him that, in default of his so doing, they had instructions to sue him for the amount. Five days after the revocation of his mandate, the accused paid the sum of $279.50 to the curator, reducing the balance in his hands to the sum of $1,076.50.

Léon Privé was the tenant of the property known as number 149 Sanguinet Street, at the time of its purchase by the accused and his brother, at a rental of $12 a month, and it is in evidence that from the date of the purchase of the property up to the date of the judicial abandonment, the accused had collected monthly the rent due by Mr. Privé, and that he did so in his quality of joint owner of the house. He

continued after the judicial abandonment of the property to collect the rent, and he did so under the authority of the mandate given to him by the curator up to the date of its revocation on the 16th day of November last; but the power to collect which he held under the mandate was never communicated or made known either to Mr. Privé or to his wife, and he ostensibly continued to collect Mr. Privé's rent as one of the joint owners of the property.

On the 5th day of December last, although his mandate had been revoked, and he knew that he had no power under it at that time, the accused called at Mr. Privé's house to collect the rent for the month of November, and it was paid to him by Mrs. Privé. The circumstances under which Mrs. Privé paid the rent to him, and the way in which he presented himself, are explained by Mrs. Privé in her evidence, as follows:

Q.—Lorsque vous êtes entrée là, que vous êtes devenue locatoire, qui était propriétaire de la maison?

R.—Mr. le Dr. Piché.

Q.—Est-ce que Mr. Piché est resté proprietaire, avez-vous continué à payer loyer à Mr. Piché?

R.—A Mr. Létang, depuis l'éte dernier, je crois.

Q.—Alors, c'est lui qui venait collecter le loyer?

R.—Oui, Monsieur.

Q.—Le 5 décembre, avez-vous payé un certain montant de loyer?

R.—Oui, Monsieur, comme d'habitude.

Q.—A qui avez-vous payé ce montant?

R.—A Mr. Létang.

Q.—Quelle sonme avez-vous payée?

R.—$12.

Q.—Pour le loyer de la maison que vous occupiez?

R.—Oui, Monsieur.

Q.—Mr. Létang était-il venu lui-même chez vous?

R.—Tojours.

Q.—Questce qu'il est venu faire le 5 décembre?

R.—Il est venu comme d'habitude chercher son loyer.

Q.—Qu'est-ce qu'il a dit en entrant?

R.—Il s'est assis comme d'habitude, il a parlé de la question du loyer, il venait tous les mois, et je l'ai payé comme d'habitude.

Q.—Alors il s'est présenté comme propriétairre comme d'habitude?

R.—La même chose.

Q.—Il ne vous a rien dit pour vous laisser supposer qu'il ne l'était pas?

R.—Non, Monsieur.

Q.—Alors, cette journée là, quand il est venu collecter, il s'est représenté comme le propriétaire?

Q.—Oui, Monsieur.

Q.—Il est entré de la même manière qu'il entrait précédemment?

R.—Oui, Monsieur.

The accused was in point of fact, charged with having falsely represented himself as being the joint owner, and as having as such the right to collect and receive the rents of the house, and of having by such false pretence induced Mrs. Privé to part with her money. The jury, as I stated before, found the accused guilty, and the accused has applied to me for a reserved case.

His pretension is, that from the evidence it appears that neither Léon Privé nor his wife ever knew anything about the authorisation given to the accused to collect the rent; that Mrs. Privé had declared that she had always paid the rent to the accused both before and after the judicial abandonment made by the firm of Létang, Létang and Company, and that she had evidently trusted the accused with her money, and had relied entirely upon his honesty; that in order to constitute the crime of obtaining money under false pretences it must be made manifest that the party who paid his money had been induced to part with it by false representations; that she had always paid the rent in ignorance of the authorization given to the accused, and that her consent was in no way affected by its revocation; and that she had parted with her money freely and without any inducement whatever on the part of the accused. He asks me to refer the following

question to the Court of Appeal, viz: "Whether the facts disclosed in this case constitute the crime of obtaining money by false pretences."

The crime of obtaining money by false pretences consists of a person inducing another to part with his money by means of the false and fraudulent representation that some fact exists or existed, which he makes with knowledge of its falsity and with the intent to deceive and defraud. A false pretence may be defined, in short, to be a representation of some fact or circumstance calculated to mislead, which is not true. The Criminal Code in article 358, defines a false pretence to be a representation either by word or otherwise of a matter of fact, either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon it. The false pretence need not be made in words or writing, it may be made "otherwise" and it will suffice if it is signified by the conduct and acts of the accused. As put by Bishop (on Crimes, vol. 2, par. 430): "The pretence need not be in words, but it may be sufficiently gathered from the acts and conduct of the party."

In the present case, two things had to be established: In the first place, the false and fraudulent representation of something as an existing fact with intent to defraud; and in the next place that the money was parted with as the direct result of the false pretence.

The evidence in this case, to my mind, shows clearly that the accused by his conduct represented to Mrs. Privé that he was the joint owner of the property, and as such entitled to collect and receive the rent of the house which she and her husband occupied, and that he did so both before and after the judicial abandonment. As a matter of fact, he had before the judicial abandonment the right as joint owner to collect and receive the rent, and after the abandonment he had the right to receive the rent under the mandate given to him by the curator. Up to the 16th day of November last, he had power and authority to collect the rent, but after that date he had no right to do so. He knew that he had not the right

to collect and receive the rent, and yet, he presented himself on the 5th day of December last as he had always done previously, and by his conduct and act he falsely represented himself as having a right to collect and receive the rent which he did not really possess. The representation made by his conduct in the matter therefore, to my mind, really constituted a false pretence.

In the next place the evidence also shows that the parting with the money by Mrs. Privé was the direct result of the false pretence; she paid the rent because she believed from the conduct of the accused when he called upon her for it, that he had the right to receive it. She parted with her money because she was misled and deceived, and under the inducement of the false pretence made by the accused at the time the money was paid; and she did not part with it freely and without any inducement on the part of the accused, and because she trusted to his honesty, as pretended by him in his motion.

I am of opinion that the facts disclosed in the case constitute the crime of obtaining money by false pretences, and I must add that I have no doubt on the question.

The rule with respect to the reserving of questions of law, is that a question should be reserved if the trial judge has some doubt in the matter, but that he should refuse to reserve a question when he has no doubt whatever on the subject. In the latter case the party desiring to have a question of law referred to the Court of Appeal for its opinion, is not, however, deprived of all recourse; he may then apply to the Attorney-General for permission to move the Court of Appeal for leave to appeal from the judge's ruling.

As I have no doubt in this case, I am constrained to refuse the application for a reserved case, and the motion of the accused is rejected.

As the accused's counsel intends to apply to the Honorable Attorney-General for leave to move the Court of Appeal, I postpone sentence until Monday, the 27th day of March instant, to give him time to make application, and until that

date the accused will remain under the bail which he has given.

Motion rejected.

J. P. Cooke, Q.C., for the Crown.
H. C. St. Pierre, Q.C., for the defendant.

QUEBEC, June 12, 1899.

The defendant applied to the Court of Queen's Bench sitting as a Court of Appeal for leave to appeal from Mr. Justice Wurtele's decision refusing to reserve the question above mentioned, and on the 12th June, 1899, the Court presided over by the Honorable Sir Alexander Lacoste, C.J., and the Honorable Justices Bossé, Blanchet and Hall, rendered the following judgment, dismissing the petition for leave to appeal :

"The court of our Lady the Queen, now here, having heard counsel as well for the Crown, as on behalf of the defendant Calixte Létang, upon the petition of the latter for leave to appeal from the decision of the Honorable Mr. Justice Wurtele, presiding judge at the trial of the said Létang, on the charge of having obtained money by false pretences, at the Court of Queen's Bench, Crown side, at Montreal, on the twentieth day of March last (1899), refusing to reserve the question for the opinion of this court, whether the facts disclosed in the said case constitute the crime of obtaining money by false pretences, having seen the consent of the Attorney-General for leave to defendant to move this court, examined the documents fyled, and on the whole maturely deliberated ;

"Considering that the point submitted is not a question of law, but an issue of fact within the jurisdiction of the jury, and upon which they have passed ;

"Doth refuse the defendant's petition for leave to appeal, and the same is hereby rejected."

H. C. St. Pierre, Q.C., for the defendant.
J. P. Cooke, Q.C., for the Crown.

Note: *False pretence—Distinction from "theft"—Cr. Code 358, 359.*

If by means of any trick or artifice the owner of property is induced to part with the *possession* only, still meaning to retain the right of property, the taking by such means will amount to larcency; but if the owner part with, not only the possession of the goods, but the *right of property* in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences. Roscoe Cr. Evid., 12th ed. (1898) 562; *R.* v. *Middleton*, L.R. 2 C.C.R. 38.

If a person is convicted upon an indictment for obtaining goods by false pretences or other fraud, he cannot afterwards be lawfully tried upon an indictment for larceny of the same goods. *Reg.* v. *King* (1897) Q.B. 214, 75 L.T., 392. The same case lays down that on a trial for false pretences, where the alleged pretence is an untrue statement as to the prisoner's position and occupation, the opinion of the prosecutor as to such position and occupation, based on a letter received by him from the prisoner, is admissible (though not conclusive) as evidence of the belief of the prosecutor in the truth of such false statement.

False pretence by conduct.

It has been held that a false pretence may consist of being garbed in a university cap and gown for the purpose of fraudulently obtaining credit. *R.* v. *Barnard*, 7 C.&P. 784. Or falsely pretending to be one of a class of traders at a market. *R.* v. *Burrows*, 11 Cox C.C. 258. And it is also an offence to fraudulently obtain goods by giving in payment a cheque upon a bank with which the person drawing the cheque has no account or if he has insufficient funds there to meet it and knows that it will not be paid. *R.* v. *Jackson*, 3 Camp. 370.

If money is obtained by the joint effect of several false representations it is sufficient if the actual substantial pretence be charged, although it may appear that other pretences not charged operated to some extent as an inducement to the

Note—*Continued.*

prosecutor to part with the money. *R.* v. *Hewgill*, Dears. C.C. 315.

If the indictment charges a pretence which is proved to have been made, but it also appears that the defrauded party gave up the money or property wholly in consequence of another and subsequent representation, a conviction cannot be sustained on the indictment so laid. *R.* v. *Bulmer*, L.& C. 476.

[SUPREME COURT OF NEW BRUNSWICK.]

Ex parte FLANNAGAN.

Disqualification of magistrate — Bias — Relationship — Ratepayer—Conviction as a 'minute of adjudication'— Full answer and defence—Refusal of magistrate to give evidence—Cr. Code 850.

1. A magistrate is not disqualified from trying a charge laid by a chief license inspector of unlawfully selling liquors, because of the assistant license inspector's wife being a niece of the magistrate, if the assistant inspector had in fact nothing to do with the laying of the charge, and took no part in the prosecution.
2. A magistrate is not disqualified from adjudicating upon an information by reason of his being a ratepayer of a municipality into whose treasury any fine imposed in the case would be payable when realized.
3. A conviction in extended form if drawn up at the time when the "minute of adjudication" should be made and in lieu of it, is a sufficient compliance with a statutory requirement of a minute of adjudication.
4. Where the presiding magistrate is called as a witness for the defence but refuses to be sworn, a summary conviction made without his evidence should not be quashed unless it is shown that the request to have the magistrate called as a witness was made in good faith by the defence, that the magistrate could give material evidence and that the accused was therefore prejudiced.

On the first day of term, Phinney, Q.C., moved for a rule nisi for a certiorari to remove a conviction made against the applicant, Martin Flannagan, by Robert H. Davis, stipendiary magistrate, of Richibucto, Kent County, for selling liquor

without a license contrary to the provisions of the Liquor License Act, 1896, with a view of quashing the same.

The grounds are set out in the judgment of Mr. Justice Van Wart.

FREDERICTON, N.B., November 12, 1897.

The judgment of the court was delivered by

VAN WART, J.—

The applicant was convicted by and before the stipendiary magistrate for the County of Kent, for unlawfully selling intoxicating liquors without license contrary to the provisions of the Liquor License Act, 1896.

The conviction is sought to be set aside on the following grounds :

1. The information was laid by the inspector, and the wife of the assistant inspector being a niece of the magistrate disqualified him from hearing the matter.

2. The magistrate is a ratepayer in the county in and for which he is stipendiary magistrate.

3. The magistrate did not make any minute of his conviction or adjudication.

4. The magistrate refused to be sworn as a witness for the defendant when called.

5. The magistrate awarded costs of conviction, which he had no legal right to do.

There is not anything in the evidence or affidavits read on moving for this rule, showing that the assistant inspector had anything to do with the laying of the information, or the prosecution of the case, or the procuring of witnesses. The evidence shows that his appointment was gazetted on October 6th, and that the information was laid on the 22nd of September previous, and that the hearing was begun on the 28th of September. Under such circumstances the relationship would not be sufficient to raise such a reasonable ground or suspicion of bias in the magistrate as would disqualify him from hearing the matter.

The magistrate's being a ratepayer in the county, and the fines being paid when collected into the funds of the county, would not disqualify the justice if it appears (as it does in this case) that all the justices in the county are ratepayers. If one is disqualified all are equally so. In such case the doctrine of *ex necessitate* applies, and any justice would be qualified.

The affidavit on which the rule was moved merely alleges that the magistrate, after announcing his judgment did not make any minute of his adjudication and conviction as required by Con. Stat. N.B., c. 62, s. 22, and that the persons present separated without any minute being made, and that afterwards the magistrate drew up the extended conviction. It is not put forward that any adjournment was made or had before the conviction was drawn up. What the magistrate did was, without making any minute, to draw up the conviction. I think that the minute may well be the conviction extended, if done at the time when the minute should be made and in lieu of it. It is a full and complete conviction and contains all the requisites of the (so called) minute, and is in that sense a minute. I think it was a sufficient compliance with the provisions of the Act.

It appears that the magistrate was called as a witness on behalf of the applicant. The magistrate wanted to know what he was required as a witness to prove. And counsel for the prosecution offered to admit what it was desired to prove, if it was a fact, and counsel could state what it was. Applicant's counsel refused to give any information, and the magistrate, thinking it was a trick to oust him of his jurisdiction, refused to be sworn. The affidavit read, on moving for the rule, set forth what evidence the magistrate was expected to give, but the person deposing, shows by his affidavit that he did not have and could not have any personal knowledge that the magistrate knew or had any information about the matter he was desired as a witness to prove. It is not, I think, necessary to determine under what circumstances, if any, a presiding magistrate may refuse to be sworn as a witness. If he refuses, and advantage is sought to be taken

of such refusal, I think it should be made apparent to the court that the magistrate was required bona fide as a witness, and that the party complaining has been prejudiced by such refusal, and that the magistrate could speak to the matter he was proposed to be interrogated upon. I think all these elements are wanting in this case, and that the court in the exercise of its discretion should refuse the rule on this ground.

The right of the magistrate to award costs of conviction has been heretofore decided by the court in the affirmative. There cannot be any doubt, it seems to me, as to the right under s. 62 of the Act, which expressly provides for costs.

In my opinion the rule should be refused on all the grounds taken.

Rule refused.

Note: *Disqualification of magistrate—Bias—Relationship—Pecuniary interest.*

See *Ex p. McCoy* (N.B., 1896) 1 Can. Cr. Cas. 410, and note to same; *R.* v. *Herrell* (Man., 1898) 1 Can. Cr. Cas. 510; *R.* v. *Steele* (Ont., 1895) p. 433, and note p. 442 *ante*.

[COUNTY COURT OF HALTON, ONTARIO.]

BEFORE HIS HONOR JOHN M. HAMILTON, COUNTY JUDGE.

THE QUEEN v. HAZELL.

Liquor License—Intoxicating liquors—Place of sale—Delivery.

1. A person licensed to sell liquors by retail at certain premises only, is not guilty of illegally selling because he obtains orders from customers elsewhere, if he puts up the liquors at, and forwards them from, the licensed premises.

MILTON, ONT., June 20, 1899.

HAMILTON CO. J.—

Appeal by defendant to judge of County Court of the County of Halton, from a conviction for selling liquor without

a license, on the 18th April last, in the village of Burlington, in the County of Halton, by R. G. Baxter and O. T. Springer, justices of the peace for said county, dated May 15th, 1899.

It appeared from the evidence which was not disputed :

(1) That the defendant is a grocer residing and doing business in the city of Hamilton, and is the holder of a shop license issued to him during the current year, authorizing him to sell liquors in his shop in the said city of Hamilton in quantities not less than three half pints.

(2) That one Frank Hooper, an employee of defendant, who drives one of his delivery waggons, delivered in Burlington on 18th April last, six bottles of porter to Mrs. S., six bottles of porter to Mr. K., and "some liquor" to Mr. C., all of which he brought that day from defendant's shop in Hamilton.

(3) The said three persons are residents of said village of Burlington, and have been for years regular customers of defendant, and are accustomed to give their orders to defendant's "traveller" one Layland, who visits Burlington every Monday for the purpose of taking orders for groceries generally from defendant's customers living there. These orders are sent or taken by Layland to defendant's shop in Hamilton, where the goods so ordered are packed into separate parcels and sent to appellant's said customers in Burlington in his delivery waggon free of charge for carriage to that place.

On this evidence it seems to me clear that the three sales of liquor complained of were made in appellant's shop in the city of Hamilton, where he is duly authorized to sell such quantities of liquor to be drunk off his premises, and where these goods were duly appropriated to each purchaser. I do not think that it makes any material difference so far as the Liquor License Act is concerned, where defendant delivered liquor so sold in Hamilton, or whether he sent it by his own delivery van or by an express company.

I do not see how this case is distiguishable from *Pletts* v. *Beattie*, (1896) 12 Times L.R. 227-8 relied on by defendant's counsel, where the conviction for such a sale was quashed, Mr.

Justice Wills observing: "Although there was to be a delivery in Acrington" (Burlington), "the sale took place at Burnley," (Hamilton), "the sale and the delivery were two distinct elements in the contract. The statute meant that the substantial elements of the sale should take place on the licensed premises although the goods were consumed off."

Mr. Justice Day remarked in the same case: "When appellant selected and put the six bottles in waggon for customer, these six bottles were appropriated. In my opinion the sale took place in Burnley," (Hamilton).

The appeal must therefore be allowed, and the conviction quashed.

Conviction quashed.

A. M. Lewis, for appellant.

T. G. Matheson, County Crown Attorney for Halton, in support of conviction.

Note: *Liquor License Act (Ont.)—Sale at place not authorized by license—Appropriation and delivery.*

In *Pletts* v. *Campbell* (1895) 2 Q.B. 229 the facts were, that a brewer, having an off-license for the sale of beer by retail, was in the habit of sending his cart containing jars of beer, around to houses in the neighborhood; the jars were delivered from the cart at the customers' houses in pursuance of orders given by the customers at their houses to the carter in the previous week, the price being paid by the customer to the carter in the week succeeding delivery. There was, however, no label or mark upon the jars to show that any particular jar had been appropriated to any particular customer. It was held that the sale of the beer must be taken to have been made at the house of the customer and not at the licensed premises, and that the brewer was properly convicted under the English Licensing Act, 1872, (sec. 3), of selling intoxicating liquor at a place where he was not authorized by his license to sell the same, he being licensed to sell only at a certain house and premises. Wills, J., there said:—"There is no evidence of any transaction at the "licensed place except the mere fact that the goods were "stored there and despatched from there; everything else

Note—*Continued.*

"took place at the customer's house. . . . . What "took place at the licensed place did not amount to a com- "plete appropriation with the assent of the respective "purchasers of the jars, which was made either at the "customer's house or at the cart." Wright, J., in the same case said:—"In an agreement of bargain and sale, or of "sale and delivery, there is no sale so long as it is uncertain "to what articles the contract applies; here there is nothing, "till the arrival of the cart at the customer's door and the "selection there of one out of several jars, to shew a sale of "one jar more than another."

In the later case of *Pletts* v. *Beattie* (1896) 1 Q.B. 519, 12 Times L.R. 227, 74 L.T. Rep. 148, the case of *Pletts* v. *Campbell* is distinguished. In *Pletts* v. *Beattie* the facts were, that Pletts, a brewer, having a license to sell by retail at a specified street address, intoxicating liquors to be consumed off the premises, sent a traveller to obtain orders at another town named Accrington. The traveller handed to the customer at whose house he called a printed and stamped post-card addressed to the brewery; the traveller wrote on the post-card the quantity of ale required and the customer signed the post-card, which was then posted by the traveller. The post-card contained a request to the brewer to supply the quantity of ale mentioned, weekly until further notice, and concluded as follows: "I assent to the appropriation by you to this order at your brewery of goods of the above description and in a deliverable state." The traveller selected at the brewery in accordance with the order, 6 bottles of ale, one of which he labelled with the customer's name and address, and placed them in a box together with six other bottles for another customer, one of which was also labelled. These goods with others were placed on a lorry and sent to Accrington but the load contained only such goods as had been ordered from that town. The ale in question was paid for on delivery at the customer's house in Accrington. It was held by the Court of Queen's Bench (Day, Wills and

Note—*Continued.*

Wright, JJ.,) that there had been a complete sale and appropriation of goods at the brewery and that the brewer to whom the order was addressed could not be convicted under those circumstances of selling intoxicating liquor at a place where he was not authorized to sell by his license.

It may be noted that the quotation in the *Hasell* case reported above contains only a summary of the decision in *Pletts* v. *Beattie* and does not accurately embody the exact words of the judges in that case as reported fully in the Law Reports series (1896, 1 Q.B. 519).

Mr. Justice Wills is, in the latter report, stated to have said: "The provisions of the Licensing Act were not framed "with a regard to the niceties which sometimes enter into "the consideration of a contract for goods sold and delivered; "those provisions are satisfied if the substantial elements of "a sale take place on the licensed premises though the beer "is consumed or delivered off them, and it would be a strong "thing to say that there had been a breach of the law if the "vendor, holding a license to sell beer for consumption off "the premises, undertook the delivery of the beer sold. . . "I think that what was done by R. (the traveller) when he "selected the six bottles for N. (the purchaser) and put "them in the case amounted to an appropriation of them."

In the *Hasell* case, reported above, there is not the element of a request by the customer that the goods should be appropriated or set apart for him at the seller's shop and of such an appropriation being made in a manner binding upon the customer. This, it is submitted, distinguishes the case from *Pletts* v. *Beattie*. Another important point of difference is, that in *Pletts* v. *Beattie* the party soliciting the order made no contract, the order was solicited to be forwarded by mail, and the post-card was a mere offer which had to be and was accepted at the place to which it was addressed; while in the *Hasell* case there appears to have been a valid contract of sale entered into at the time the order was given to the agent of the licensee, a contract which

Note—*Continued.*

when completed by the subsequent delivery merged into a *sale* of the liquors. It may therefore be doubted whether the decision in *The Queen* v. *Hasell* is supported by the authorities.

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WURTELE, J.

LECOURS v. HURTUBISE.

Summary conviction—Appeal from—Jurisdiction—Offence under provincial statute—Cr. Code 840, 879.

1. An appeal under Cr. Code 879, from a summary conviction in the Province of Quebec to the Court of Queen's Bench of that Province can only be taken where the offence charged is one within the legislative authority of the Parliament of Canada, and not where the offence is against a provincial statute.

MONTREAL, April 12, 1899.

WURTELE, J.—

The respondent Hurtubise was the keeper of one of the turnpike-gates erected by the trustees of the Montreal turnpike roads, and he accused the appellant Lecours with having forcibly and unlawfully passed the turnpike-gate kept by him without having first paid the legal toll. The Montreal turnpike roads are vested in and are controlled and managed by trustees who form a public corporation, which is under the legislative jurisdiction and authority of the Legislature of the Province of Quebec, and the offence of which the appellant Lecours has been charged was created by section 25 of the ordinance 3 Vict., ch. 31. By this ordinance jurisdiction over the offence is given to two justices of the peace. The complaint was heard before a magistrate having the powers of two justices of the peace; the commission of the offence was duly proved and the appellant Lecours was condemned to pay

a penalty of $1.00 and costs amounting to $16.45 and in default of payment to be imprisoned for the space of two weeks.

The appellant Lecours has appealed from the conviction rendered against him by the magistrate to the Court of Queen's Bench on its Crown side, ostensibly under the provisions of section 879 of the Criminal Code. On the hearing of the appeal the respondent Hurtubise contended that the court had no jurisdiction in the matter and asked for its dismissal.

The question is whether in the present case a right of appeal to this court exists under the section of the Criminal Code which I have just mentioned.

Under this section an appeal is given in the Province of Quebec to any person who thinks himself aggrieved by a conviction rendered against him by a magistrate in the exercise of his summary jurisdiction under the provisions of Part LVIII. of the Criminal Code relating to summary convictions, to the Court of Queen's Bench on its Crown Side, but by section 840 this part only applies to offences or matters over which the Parliament of Canada has legislative authority.

The only question therefore is whether the offence for which the respondent Hurtubise laid an information against the appellant Lecours is one under a law of Canada or under a provincial law, because if the offence is the violation of a provincial law, no right of appeal exists under the provisions of the Criminal Code, and if the appellant is wronged by the conviction he must seek a remedy under such recourse as may be given by the provincial laws.

In the present case the offence complained of is the breach of a provincial law and concerns a matter which is under the exclusive legislative authority of the Legislature of the Province of Quebec, and the right to the appeal which is sought to be exercised does not, consequently, exist.

The court has no jurisdiction in the matter brought before it and the appeal is therefore dismissed with costs.

Appeal dismissed.

C. A. Cornellier, Q.C., for the appellant.
Thomas Fortin, Q.C., for the respondent.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J.C.P., ROSE AND MACMAHON, JJ., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. COLEMAN.

Comment on prisoner's failure to testify—Effect of withdrawal —Place of trial—Change of venue—Terms concerning additional expense—Addition of new charge in indictment—Validity of trial—Administering oath to witness—Person acting for Court Officer—Can. Evidence Act, sec. 4(2) —Cr. Code 641, 651(2), 746(f).

1. An order for change of the place of trial (Cr. Code 651) is not open to objection on the ground that it makes no provision for the additional expense to which the accused might be put by the change, if the judge making such order was not asked to make an order as to such additional expense, and if it was not shewn to such judge that additional expense would be occasioned.
2. Where, after a committal for trial for an offence under the Criminal Code, an order is made changing the place of trial to another county, an indictment may be preferred in the latter county not only for the offence for which the accused was committed for trial, but for any other offence disclosed in the depositions taken before the committing justice.
3. An accused person has the right to have his case submitted to the jury without any comment on his failure to testify being made by the trial judge, and although such comment is afterwards withdrawn, the making of same is a substantial wrong to the accused, and if he is convicted he is entitled to a new trial by reason thereof.
4. Perjury may be assigned in respect of statements given in evidence in open court, although the oath was administered to the witness by a person temporarily acting in the place of the proper officer at such officer's request.

ARGUED: September 6, 1898.

DECIDED: December 23, 1898.

Crown case reserved, upon the application of the prisoner's counsel at the trial pursuant to section 743 of the Criminal Code, and a case stated by leave granted pursuant to section 744.

The prisoner had been committed for trial before the general sessions of the peace for the county of Dufferin, on a

charge of perjury, alleged to have been committed in that county, in that he did falsely swear that, he, the said John Coleman, "was present in the office of * * on * * at the time a certain order * * was signed * * and that one James Small was also present and that he heard the said James Small say, etc., and that one Robert Twible and one James Dick were also present * * ; whereas in truth the said John Coleman was not present * * and did not hear the said James Small say * * and neither the said Robert Twible nor the said James Dick were present, etc."

The place of trial had been changed from the county of Dufferin to the county of Peel under an order of the judge of the county court and chairman of the general sessions of the peace for the county of Dufferin.

The prisoner was indicted pursuant to the order of the chairman of the general sessions of the peace for the county of Peel endorsed upon an indictment containing two counts, the first of which is set out above, and the second being "that the said John Coleman * * did falsely swear that he was present in the office of, etc., * * and that he left the said office * * and went out to feed his horses and *that he had left his horses with his brother-in-law, Daniel McCurdy*, whereas in truth the said John Coleman did not leave his horses with the said Daniel McCurdy on the said date."

The facts relating to the offences set out in both counts appeared in the depositions taken before the committing magistrate.

Objection was taken by the prisoner's counsel that there was no jurisdiction to try the prisoner on the second count as the indictment was beyond the committal, which objection was overruled by the learned chairman and the prisoner was tried and convicted upon both counts.

The oath taken by the said John Coleman, when the perjury was alleged to have been committed, was administered in open court by one John McLaren, the clerk of the county court, who acted for and at the verbal request of Mr. W. J. L. McKay, the clerk of the peace.

The two questions reserved by the first case were:

1. Was there jurisdiction to try the accused on both counts of the said indictment?

2. Could the accused be legally convicted of perjury upon an oath so administered and taken?

The case stated by the second case and questions thereto were as follows:

"The accused, John Coleman, was tried before me as chairman of the court of general sessions for the county of Peel, and a jury of the said county, at the sittings of said court in December, 1897, upon a charge of perjury. The accused did not testify on his own behalf at the trial.

"In my charge to the jury referring to a certain witness named Twible who gave evidence for the Crown on the trial of the said case, I said, "There is no man has sworn he (Twible) was there (referring to a certain place) and four or five men knew whether he was there or not. Now that just shews you that a man can go into the witness box although he was a perjurer and yet tell the truth. You don't need to believe a word he says because no person else will go into the witness box and pledge their oath that he was there. A number of them knew whether he was there or not: Coleman knew whether he was there or not. Small knew whether he was there or not, and Dick knew whether he was there or not. There is not one of them dare go into the witness box and swear that he (Twible) was not there."

"I further said in the same charge referring to the said Twible's presence at the said place, "His (Twible's) is the only evidence given before you that says he (Twible) was not there. The accused (Coleman) is a man who can say whether he (Twible) was there or not."

"I further said in the same charge to the jury, "Then there was another person alleged to have been there by the name of Dick. We hear nothing from Mr. Dick so we cannot comment on his evidence. I suppose Mr. Dick has not repented yet; has not confessed. If he was there, there is no reason why he should not come forward and if this man is innocent relieve him, but he does not do so. If he was there

he is doing wrong by staying away. If he chooses to absent himself of course his friends will have to bear it. It is unfair to him. Why does not Coleman come forward and tell what he (Coleman) knows?"

"Counsel for the prisoner Coleman after the jury had retired, addressing me, said: "Your Honour spoke to the jury in reference to Coleman not making a statement himself. I think he has the right under the statute, and no comment can be made on the fact." I said, "I will correct that as it is entirely wrong."

The jury were then recalled and addressing them, I said: "The counsel said and no doubt it is correct, that in enumerating the list of those who knew who was in the office, I mentioned Coleman's name as being one of those who was there, and could if he chose go into the witness box and make statements. If I did say it in that way I should not have said so for the statute provides that neither counsel nor Judge has the right to comment on the fact of defendant not going into the witness box. It is his privilege and he may go in if he so chooses, but I didn't intend to say a word about that fact. When I was addressing you it seems I mentioned his name in connection with the others, and I mention that fact to you now. No person has a right to say anything against him if he chooses not to go into the box."

"The jury then retired and they found the prisoner guilty.

"The case stated for the consideration of the Court is:

(1) Does the said charge and subsequent statement to the jury contain comments by the Judge on the failure of the accused to testify, within the meaning of 56 Vict. ch. 31, sec. 4, sub-sec. 2 (Can.)?

(2) If the answer to 1 is "Yes," should there be a new trial?"

TORONTO, September 6, 1898.

E. F. B. Johnston, Q.C., for the prisoner. The comment by the chairman of the sessions on the failure of the prisoner to go into the witness box and testify is fatal; 56 Vic. ch. 31, sec. 4, sub-sec. 2 (Can.). It is true the comment was

withdrawn but the effect of it is there and the damage done cannot be cured by the subsequent withdrawal. Even the the comment of counsel as to the wife of a prisoner not testifying is ground for a new trial as was held in Nova Scotia in *The Queen* v. *Corby* (1898), 1 Can. Criminal Cases, 457. What the effect of the comment was is not material, the question is, was what he did warranted by law: *Regina* v. *Petrie* (1890), 20 Ont. R., at p. 324. See also *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537. There are similar statutory provisions in some of the United States and it has been held under them that if the reference has been made in the hearing of the jury the mischief is done and the only way is to enforce the statute rigidly. The damage cannot be cured: *Martin* v. *Mackonochie* (1878), 3 Q.B.D., at p. 775; *Showalter* v. *The State* (1882), 84 Ind. 562; *Frank Austin* v. *The People of The State of Illinois* (1882), 102 Ill. 261; Abbott's Trial Brief, Criminal Causes, 221. On the occasion when the perjury was alleged the administering of the oath by the county court clerk was irregular. The appointment of the clerk of the peace is peculiar and particular. The court of quarter sessions is created by statute and it is provided there must be a clerk of the peace appointed in a certain manner and the same as to his deputy, and both, by the English law which is in force here, must be approved by the Crown and take an oath of office: Dickinson's Guide to the Quarter Sessions, 104-107.

John R. Cartwright, Q.C., Deputy Attorney-General, contra. The Legislature did not intend that such a mere slip, even if not subsequently corrected, should render all the proceedings abortive when no substantial wrong is done. The prisoner is bound by the acts of his counsel at the trial who did not draw the trial Judge's attention to the slip until the charge was finished and only asked to have it corrected, and it was fully explained and corrected: Criminal Code, sec. 746, sub-sec. (*f*). The oath was properly administered in open court,—the form may be repeated by any one. It is really administered by the court or the presiding judge.

Reference was made to *Commonwealth* v. *Wooster* (1886), 141 Mass 58; *The State* v. *Thomas Ward* (1888), 61 Vermont R., at p. 180; *Martin* v. *The State* (1891), 79 Wis., at p. 165; *Clifford* v. *Thames Ironworks & Ship Building Co.*, (1898) 1 Q.B. 314; *Regina* v. *Tew*, (1855) Dears. C. C. 429.

Johnston, Q.C., in reply. The Massachusetts, Vermont and Wisconsin laws are different from ours. No acts of counsel could relieve the court in this case: *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537, *per* Wills, J., at p. 543.

TORONTO, December 23, 1898.

MEREDITH, C. J.—

Two cases have been stated by the chairman of the general sessions of the peace for the county of Peel, for the opinion of the Court; one, upon the application of the prisoner's counsel at the trial, pursuant to sec. 743 of the Criminal Code, 1892, and the other, (leave to appeal having been granted) pursuant to section 744.

The offences with which the prisoner was charged were committed, if at all, in the county of Dufferin, and he was committed for trial at the general sessions of the peace for that county for one only of the offences charged in the indictment which was afterwards preferred against him.

The place of trial was, under section 651, changed to the county of Peel by an order of the Judge of the county court of the county of Dufferin, made before the general sessions for that county began, which contains no provision for the payment to the accused of any additional expense caused to him by the change made in the place of trial.

The indictment preferred against the prisoner in the county of Peel was preferred by leave of the chairman of the general sessions of that county indorsed upon it, and contained two counts: one for the offence for which the prisoner was committed for trial; and the other for perjury alleged to have been committed on the same occasion upon which that

charged in the other count is alleged to have been committed; but the facts and evidence relating to both charges were disclosed in the depositions taken before the committing justice.

The first question reserved is:—

"Was there jurisdiction to try the accused on both counts of the said indictment?

This question must, in my opinion, be answered in the affirmative.

Even if the omission to provide in the order changing the place of trial for the payment of any additional expense thereby caused to the accused might under some circumstances be fatal to the validity of the order, which I very much doubt, seeing that by section 651 the matter is one left to the discretion of the court or judge making the order, there is nothing in the stated case to shew that it was made to appear to the judge who made the order that any additional expense to the accused would be occasioned by the change made in the place of trial, or that the judge was asked to impose any such condition; and it appears to me to be clear that in these circumstances the order was not open to the objection urged against its validity.

The right to prefer the indictment for the two offences is also, I think, clear. Had the trial taken place in the county of Dufferin, no question could have arisen, because by section 641 it is the right of the prosecutor to prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor has been bound over to prosecute, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice; and by sub-sec. 2 of sec. 651, where the place of trial is changed, all proceedings in the case are to be had, or if previously commenced, are to be continued in the district, county or place in which the trial is directed to take place, "as if the case had arisen or the offence had been committed therein."

The second question reserved relates to the validity of the oath administered to and taken by the prisoner on the occasion upon which the two perjuries assigned in the two counts are alleged to have been committed.

That occasion was the trial of one John Hamilton for forgery, at the general sessions of the peace for the county of Dufferin. The prisoner was called as a witness for the accused in that case, and the usual oath was administered to him by Mr. McLaren, the clerk of the county court of the county of Dufferin, who acted at the request of Mr. McKay, the clerk of the peace, in his place at and during the sittings of the general sessions, which were proceeding concurrently with the sittings of the county court.

It is objected that the prisoner was not duly sworn. Granting that Mr. McLaren did not fill the position of deputy of the clerk of the peace, I am nevertheless of the opinion that the oath was properly taken by the prisoner. It was taken in open court in the presence of the presiding Judge, who must be deemed to have assented to what was done by Mr. McLaren in administering the oath. It was, I think, quite immaterial by whom the words stating the nature of the obligation which the witness was taking upon himself were uttered. The effective act was the assent of the witness to it, and that was given, as I have said, in open court and in the presence of the presiding Judge, and was equivalent to the repetition by the witness in the first person of the words uttered by Mr. McLaren in the third person; and I cannot doubt that if a witness in open court, with the assent of the presiding Judge to that form being used, take upon himself the obligation involved in the oath by repeating the words of it without the intervention of the clerk of the peace or of any other person, it has the same effect as if the words of the oath were stated by the clerk of the peace and the witness' assent was given in the usual form.

The answer to the second question must be in the affirmative.

The questions reserved by the other case are more difficult of solution, and I have had some doubt as to the proper answer to be given to them.

The prisoner did not testify on his own behalf, and the presiding judge, no doubt inadvertently, but nevertheless contrary to the provisions of sub-sec. 2 of sec. 4. of the Canada Evidence Act, 1893, commented on the failure of the prisoner to testify, and he did so in pretty strong terms and unfavourably to the prisoner.

Had nothing further occurred, I do not doubt that a new trial must have been granted, but the difficulty in the case arises from what subsequently took place during the trial; for upon the attention of the learned judge being called by counsel for the prisoner to the provisions of the statute to which I have referred, the jury was recalled, and what then took place is best stated in the language of the case:

[The learned Chief Justice then set out that portion of the case relating to the recalling of the jury and the chairman's remarks to them.]

It was argued by Mr. Cartwright that the effect of what was thus done was to remedy the mistake into which the learned Judge had fallen, and that the case fell within the terms of the proviso to sub-sec. (*f*) of sec. 746 of the Code, which forbids the granting of a new trial although it appears that something not according to law was done at the trial, unless in the opinion of the Court some substantial wrong or miscarriage was thereby occasioned on the trial.

The provisions of sub-sec. 2 of sec. 4 are new to the criminal jurisprudence of this country.

The sub-section follows a provision making the person charged with an offence, and the wife or husband of the person charged, a competent witness and it reads as follows:

"(2) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury."

If it were necessary for the decision of this case to reach a conclusion as to the meaning and scope of sub-section

2, I should have much difficulty in doing it, but it is, I think, unnecessary to enter upon that inquiry. It is, I think, sufficient that the Legislature for some purpose which in its wisdom justified that being done, has forbidden both the Judge and the counsel for the prosecution in addressing the jury to comment on the failure of the accused to testify. What may and what may not amount to comment within the meaning of the sub-section it is unnecessary to consider, because what was done in this case was admittedly a contravention of its provisions and I do not see how it can be said that the effect of the comment was got rid of by the Judge telling the jury that he had inadvertently commented on the failure of the accused to testify, and that he ought not to have done so, because the law forbad it. The thing which the Legislature has forbidden was done, and it could not, from its very nature, be undone.

The prisoner had the right to have the case submitted to the jury without comment on his failure to testify, either by the Judge or the counsel for the prosecution in addressing the jury, and he has been deprived of that right. The Legislature must have deemed it to be of importance to accused persons that no such comment should be made, and the deprivation of that right must, I apprehend, be held to be a substantial wrong to the accused.

The language of Lord Chief Justice Cockburn, in *Martin* v. *Mackonochie* (1878), 3 Q.B.D., at p. 775, seems to me to be apposite to this case.

He there says: "In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in poenam* are, it need scarcely be observed, *strictissimi juris;* nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matters of right of which he cannot be deprived against his will; and the Judge must see

that they are followed. * * If the law is imperfect it is for the Legislature to amend it. The Judge must administer it as he finds it, and the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself."

I was at one time inclined to think that no greater effect should be given to the Judge's comment than to a misdirection by him as to the law, and if that were the correct view it would probably follow that having withdrawn the erroneous direction and substituted for it a correct one, it would not be open to the prisoner to complain of what had been done; but on further consideration I have come to the conclusion that the analogy is not complete. Had the statute forbidden the drawing of any inference unfavourable to the accused from his failure to testify, I could understand that the effect of an erroneous direction by the Judge that such an inference might be drawn might be got rid of by the erroneous direction being withdrawn and the proper direction given to the jury. But in regard to what is complained of in this case, the mischief is done when the comment is made, and is, in my opinion, as I have already said, from its very nature incapable of being remedied.

The questions reserved as set out in the second stated case, and each of them, must therefore be answered in the affirmative.

ROSE, J.—

Case reserved under sec. 743 of the Criminal Code.

This reservation is improper in form. [The case reserved was "For the consideration of the justices of the Chancery Division of the High Court of Justice."] The reservation should have been to the Court of Appeal, and then in terms it would have been reserved to any Divisional Court of the High Court of Justice: see 58 and 59 Vict. (Can.) ch. 40, sec. 1. I do not further consider this question in view

of the opinion I have formed on the case stated under section 744.

The first question reserved is: Was there jurisdiction to try the accused on both counts of the said indictment? Counsel for the prisoner refused to argue that this question should not be answered in the affirmative, abandoning his objection as far as the prisoner was concerned, and I think that the question must be answered in the affirmative.

The second question reserved for the opinion of the Court is: Could the accused be legally convicted of perjury upon an oath so administered and taken? This refers back to the following statement: "The oath taken by the said Coleman at the trial of *The Queen* v. *Hamilton*, and on which perjury was assigned, was administered in open court by one John McLaren to the accused under the circumstances set out in the evidence of His Honour Judge McCarthy, W. J. L. McKay, clerk of the peace, and John McLaren, clerk of the county court, all of the county of Dufferin, all of which is herewith submitted as part of the reserved case."

Mr. McLaren acted as clerk of the peace at the request of Mr. McKay, and he (McLaren) in the presence of Judge McCarthy, the court being in session, handed the Bible to the witness and repeated the words of the oath, the witness kissing the book and thereupon giving evidence. There was no formal appointment of Mr. McLaren other than as stated.

An oath is stated to be "An outward pledge given by the juror taking it, that his attestation or promise is made under an immediate sense of his responsibility to God": Tyler on Oaths, 15. Again, "an oath is a religious asservation, by which we either renounce the mercy, or imprecate the vengeance of Heaven, if we speak not the truth. That this is the sense and purport of oaths, appears from those forms of words in which they are commonly expressed, as 'So help me God,' 'God be my witness,' 'God be my Avenger,' and other equivalent terms which amount to much the same": Pufendorf, book 4, ch. 2, sec. 2. It is therefore something which is to bind the conscience of the witness, and is taken by the witness; and I feel no doubt that when

the words of the oath are stated to the witness by anyone, in the presence and with the sanction of the court, and the witness takes upon himself the obligation by kissing the book or going through such other form as is permitted by law, the oath is duly administered by the court.

It was admitted by counsel for the prisoner that if the witness had spoken the words of the oath in the first person, the oath would have been administered. It was hardly denied that if he, after the words were repeated to him, had said "So help me God," and afterwards had kissed the book, that the oath would have been administered. And I think that he equally took upon himself the obligation of the oath when he kissed the book. This seems to me to be the result of the consideration of the nature of an oath, its object and purpose.

I find the question has arisen in the United States. I refer to *Server* v. *The State* (1826) 2 Blackf. (Ind.) 35, in error, in the Supreme Court of Judicature of the State of Indiana. The following is the note that I find in Blackford's Reports, vol. 2, 2nd ed., p. 35: "In an indictment for perjury, the oath said to be false was charged to have been administered in the circuit court by S. C. as deputy clerk. *Held*, that no proof of the appointment of the deputy clerk was necessary; that in administering the oath S.C. acted under the superintendence of the court, and that the oath was as obligatory as if it had been administered by one of the Judges."

In the California Reports, vol. 48, p. 197, is the case of *Julian Oakes* v. *John Rogers* (1874). In that State the statute provides that "Before making the order the court or judge shall administer to the applicant the following oath" (giving the form of the oath). The court there said: "We think an oath administered by the clerk in open court under its direction, is an oath administered by the 'court' in the sense of the statute; and upon the facts appearing in this record, we will presume it was so done."

These cases go to show that, in the opinion of the courts before which they came, the repeating of the words to the witness in the presence of the court was the act of the court,

and nothing is made of the fact by whom the words were spoken. Moreover, I think that if anything turned upon the words of the oath being administered to the witness by the clerk any person acting for the regularly appointed clerk, with the concurrence of the court, is *de facto* the clerk of the court.

Judgment on the reserved case must be for the Crown.

In the same matter we have a case stated under sec. 744 of the Criminal Code by the direction of the Court of Appeal. I think it will be convenient to set out in full the case as stated.

[The learned Judge then set out the case reserved.]

On the facts set out in the case, I have no doubt that there were comments made by the Judge on the failure of the accused to testify. The words of the statute are: "(2) The failure of the person charged * * to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury." It was hardly contended that what was said by the learned Judge was not a comment upon the fact. Indeed it would seem to me to be idle to argue to the contrary.

The second question was left to us, I think, by inadvertence, because the question as to whether or not there should be a new trial is not one which depends at all upon the question being left to the court in the stated case but upon the provisions of sec. 746 of the Code where the powers of the court are stated.

It is not our duty in this case to direct a new trial notwithstanding "that something not according to law was done at the trial," unless in our opinion "some substantial wrong or miscarriage was thereby occasioned on the trial: sub-section (*f*).

It is certainly clear that something not according to law was done at the trial; and in my opinion a substantial wrong was occasioned, for the prisoner was entitled to a trial free from comment or observation upon the fact that he did not tender himself as a witness. He had the right to refrain

from giving evidence without his failure to testify being made the subject of comment. He had a statutory right. That right he was deprived of, and being deprived of that right by the learned Judge, a wrong was occasioned, and I think a very substantial wrong, and a wrong that in my opinion could not be removed or remedied by the learned Judge calling back the jury and telling them that he had done wrong, as he did do; for in stating what he did to the jury he of necessity repeated the offence of which complaint had been made.

Nor do I think that anything was done by counsel for the prisoner which at all stands in the way of the objection being taken by the prisoner, if indeed on any state of facts such objection by the Crown were tenable. All that the prisoner's counsel did was to call the attention of the court to the prisoner's right under the statute. If the statement by the court to the jury that the statute had been violated took away the right of the prisoner to the benefit of the statute, why of course there is nothing more to be said; but if not, the fact that the attention of the court was called to the error certainly did not deprive the prisoner of his right to move the court for a new trial. Some authorities were referred to by counsel as to the rights of the prisoner to have a trial according to law. *The Queen* v. *Gibson* (1887), 18 Q. B. D. 537; *Regina* v. *Petrie* (1890), 20 Ont. R. 317; *Martin* v. *Mackonochie* (1878), 3 Q. B. D., at p. 775. The following were also cited: *Frank Austin* v. *The People of the State of Illinois* (1882), 102 Ill. (S. C.) 261; *Showalter* v. *The State* (1882), 84 Ind. (S. C.) 562.

For these reasons I think that a new trial should be directed.

MACMAHON, J.—

I agree, and have only a word to add as to that part of the reserved case under the Evidence Act, 56 Vict. ch. 31, (Can.), which provides (section 4): "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness,

whether the person so charged is charged solely or jointly with any other person." * * And by sub-section 2: "The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury."

So that the Legislature, while making an accused person a competent witness, intended to prevent any prejudice resulting to him from his failure to testify on his own behalf, by interdicting the Judge and counsel for the Crown from commenting to the jury on such failure. It was because of the certainty which existed in the mind of Parliament that prejudice would result to the accused as a consequence of such comments that there was the positive prohibition against such comments being made.

The learned chairman of the sessions, in commenting on the prisoner not giving evidence on his own behalf, contravened the Act, and therefore prejudiced the fair trial of the prisoner. The making of the comment was a direct violation of the law. How, then, can the court say there was not "some substantial wrong or miscarriage thereby occasioned at the trial?" although the Judge recalled the jury, and after referring to the error he had made in his charge, said that "no person has a right to say anything against him (the prisoner) if he chooses not to go into the box."

In *The Queen* v. *Corby* (1898), 1 Can. Cr. Cases 457, which was before the Court for Crown cases reserved in Nova Scotia, it appeared that on the trial of the prisoner for theft, the prisoner gave evidence on his own behalf. The prisoner's wife was not called as a witness on behalf of the defendant. Counsel for the prosecution made the failure of the wife of the accused to testify the subject of comment unfavourable to the prisoner, in his address to the jury. A new trial was granted, and Ritchie, J., at p. 464 of the report, made these pertinent observations: "When once the comment is made the mischief which the law was designed to prevent has been done and nothing can afterwards be said

by either counsel or Judge that will be calculated entirely to remove the effect of that comment upon the minds of the jury.".

One would say if the design of sub-sec. 2 of sec. 4 was to prevent the prisoner being prejudiced on his trial, then, the Act being violated, a fair trial was not had. If a fair trial was not had, a substantial wrong was done the prisoner.

New trial ordered.

Note: *Comment on failure to testify.*

See note to *R.* v. *Corby* (1898) 1 Can. Cr. Cas. 466.

Appeal—Leave to appeal after refusal of a 'reserved case'—Form of order—Practice—Cr. Code 744.

If the court before which the trial took place refuses to reserve a case upon a question of law for the opinion of the Court of Appeal, the person convicted may apply to the Attorney-General for his consent to a motion to the Court of Appeal for leave to appeal; Cr. Code, s. 744 (1); and, if the Court of Appeal grants the leave, a case shall be stated for the opinion of the Court of Appeal 'as if the question had been reserved'; sec. 744 (3). The Code is not explicit as to whether the form of the stated case is to be settled by the Court of Appeal or by the trial court. In the case above reported the Court of Appeal made an order for leave which included in detail the form of the case to be stated and a direction to the trial judge, in this case a chairman of a Court of General Sessions, to state the case so set forth.

[SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND TASCHEREAU, SEDGEWICK, KING AND GIROUARD, JJ.

VIAU v. THE QUEEN.

Supreme Court of Canada—Jurisdiction—Appeals in criminal matters—Affirmance of conviction by court below with dissent—Judgment ordering new trial, but affirming decision at trial on collateral question—Effect on new trial—'Opinion' of the majority, meaning of—Cr. Code 742, 750.

1. The right of appeal in criminal cases to the Supreme Court of Canada from the decision of a Court of Criminal Appeal is restricted to cases where the conviction has been affirmed by the Court of Appeal, and then only in case one or more of the judges of the latter court has dissented from the decision of the majority of the court.
2. If by the decision of the Court of Appeal, the conviction is set aside and a new trial ordered, there is no appeal therefrom to the Supreme Court of Canada.
3. The dissent from the 'opinion' of the majority (Cr. Code 742) by any of the judges of the Court of Appeal which is necessary in order to confer the right of a further appeal to the Supreme Court of Canada has reference to the 'decision' or 'judgment' of such majority in affirmance of a conviction (Cr. Code 750); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision is not reviewable by the Supreme Court of Canada.

ARGUED: October 13, 1898.

DECIDED: October 13, 1898.

Appeal from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) on an appeal from the Court of Queen's Bench (crown side) in the District of Terrebonne, by which the verdict of guilty against the appellant was quashed and set aside and a new trial ordered upon the indictment for murder presented against her.

The appellant, Cordelia Viau, was indicted for murder, and

upon her trial the jury found a verdict of guilty on the 2nd February, 1898. In the course of the trial, objections were raised by counsel for the prisoner against the reception of some of the evidence adduced, upon four points, as follows :

" 1. That certain admissions alleged to have been made by the prisoner, had been obtained under the influence of improper inducements by persons in authority ; "

" 2. That the prisoner's deposition made before the coroner at the inquest was not admissible in evidence against her ; "

" 3. That the evidence of a witness who was under accusation of having been a party to the murder, was not admissible against her ; and

" 4. That secondary evidence of the contents of two letters was not admissible, as there was no proof that their production was impossible."

The first point was reserved as a question of law by the presiding judge on the trial, but he refused to reserve the case upon the three other objections raised on behalf of the prisoner. Leave to appeal on the three last points was subsequently obtained on application to the Attorney-General for Quebec, and the trial judge accordingly stated the case to be submitted to the Court of Queen's Bench, sitting in appeal, for the opinion of the court upon all the objections so taken.

The Court of Appeal decided :

1. That it did not appear that the confession had been made under the influence of improper inducements, but was free and voluntary, and admissible as evidence before the jury ;

2. That the deposition before the coroner should not have been received in evidence at the trial in consequence of the provisions of the Canada Evidence Act, 1893 ;

3. That the evidence of the witness accused of having been a party to the murder was admissible as he had not been indicted jointly with the prisoner, and was not being tried jointly with her ; and

4. That the secondary evidence of the contents of the

letters should not have been admitted, as it had not been proved that it was impossible to produce them, nor even that they had ever existed.

The Court of Appeal accordingly ordered and adjudged that there had been a mis-trial; that the verdict against the prisoner should be quashed and set aside, and a new trial of the prisoner had upon the indictment, two of the judges of the Court of Appeal dissenting from the opinion of the majority of the court, upon the question as to the admission of the confession in evidence.

The prisoner on this appeal did not attack the order for a new trial, but her object was to obtain a reversal of the decision that the confession had been properly admitted in evidence, and was based upon the dissent of these two judges upon that question as above mentioned.

On the appeal being called for hearing a motion was made to quash the appeal for want of jurisdiction.

Cannon, Q.C., Assistant Attorney-General for Quebec, for the motion: No appeal lies, inasmuch as the conviction was not affirmed on the appeal to the Court of Queen's Bench, but on the contrary the conviction was quashed and set aside by the judgment of the Court of Queen's Bench and a new trial granted. See Criminal Code, s. 750.

Poirier, contra: The appeal in the court below was on several grounds, and as to one of the questions raised, that respecting the admission of the confession in evidence, the decision of the Court of Queen's Bench affirmed the decision of the trial judge allowing this evidence to go to the jury. We contend that the decision is not according to the law of evidence that should govern the case, and it may have a serious effect to the prejudice of the prisoner on her new trial, unless that part of the judgment is reversed on the appeal now sought to this court. There are dissents from this part of the judgment by two of the judges who heard the appeal in the court below, and consequently an appeal on this ground should be allowed, as was done in the case of *McIntosh* v.

The Queen, 23 Can. S.C.R. 180, for there has been upon this point both an affirmance and a dissent as contemplated by the statute.

OTTAWA, October 13, 1898.

The judgment of the court was delivered by

THE CHIEF JUSTICE—

(Oral.)—The court is unanimously of opinion that there is no jurisdiction to entertain the appeal in this case. Section 742 of the Criminal Code, 1892, makes provision for appeals to this court where there has been dissent in the Court of Appeal, but that appeal is given only as thereinafter provided; this proviso refers to section 750 of the Criminal Code, by which such appeals are restricted to cases where the judgment of the majority of the Court of Appeal has affirmed the conviction on an appeal under section 742. In the present case the Court of Appeal did not affirm the conviction, but on the contrary quashed it and set it aside upon two of the grounds raised by the appellant, and directed a new trial upon the indictment. This distinguishes the case from that of *McIntosh* v. *The Queen*, 23 Can. S.C.R. 180, in which the decision appealed from was affirmed by the Court of Queen's Bench. In this case, although the majority of the Court of Appeal affirmed the decision as to the admission of the confession in evidence against the prisoner, and two of the judges who heard the appeal dissented from the view of the majority of the court upon that question, yet this difference of opinion and the questions raised as to the confession and whether it was improperly obtained, and what effect this opinion of the majority of the Court of Appeal might have at the new trial of the prisoner, cannot in any manner affect the competence of this court. The jurisdiction of this court depends entirely upon the statutes from which it derives its powers in both civil and criminal matters, and we are given no jurisdiction to hear appeals in criminal cases except in those

where there has been not only an affirmance of the conviction, but also some dissent amongst the judges in the Court of Appeal. We have been given no jurisdiction in cases where the Court of Appeal by a unanimous judgment has ordered a new trial.

In section 742 the word "opinion" must be construed as meaning the decision or judgment of the court as clearly appears on reading the context contained in the first sentence of the sub-section in which that word is used.

The appeal must be quashed.

Appeal quashed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J. C.P., AND ROSE, J., SITTING AS A COURT OF APPEAL FOR CROWN CASES RESERVED.

THE QUEEN v. McBRIDE.

Corroboration — Forgery — Evidence 'implicating' the accused — Comparison of handwriting — Cr. Code 423, 684.

1. A witness who testified that the forged signatures were written by the accused is not corroborated in a 'material particular by evidence implicating the accused' by proof that certain other signatures were in the same handwriting, when the only evidence showing that the latter signatures were written by the accused was the testimony of the *same* witness who had testified to the handwriting of the signatures first mentioned.

ARGUED: June 1, 1895.

DECIDED: June 29, 1895.

Case reserved by the police magistrate of Chatham, under sec. 743 of the Criminal Code, 1892.

Two charges of forgery were made against the prisoner, and the only question to be decided is, whether the evidence adduced was, having regard to the provisions of sec. 684 of the Code, which enacts that no accused person shall be convicted of, amongst other enumerated crimes, forgery, "upon

the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused" sufficient to justify his conviction.

The documents alleged to have been forged were, in the one case, a certificate of the death of George W. Long, for the purpose of supporting a claim against the Metropolitan Insurance Company payable on proof of the death of Long, which purported to be signed by T.C. Baker, the medical officer of the company; and in the other case an indorsement purporting to be made by Wilmena Long upon a cheque for $190, drawn by the company in settlement of the claim and payable to her order.

It was made clear that both of these names had been forged, and it was sought to connect the accused with the forgeries by the evidence of Charles Davis, who testified that both of the names were written by the accused.

There was no corroboration of Davis by evidence implicating the accused, unless, as the police magistrate held, it was supplied by proof that certain names written in a book, which were sworn by Davis to be in the handwriting of the accused, were written by the same hand which wrote the signatures in question.

Lewis, for the prisoner. The Crown cannot succeed on the evidence of one witness: Criminal Code, 1892, sec. 684. If what appears here is sufficient, the statute is avoided: *Regina* v. *Giles*, 6 U.C.C.P. 84. The supposed corroboration is practically the same man's evidence, the evidence of the accomplice: Taylor on the Law of Evidence, 8th ed., at p. 831. As to expert evidence: *Rowley* v. *London and North-Western Railway Co.*, L.R. 8 Exch. 221, 228; *Doe dem. Madd* v. *Suckermore*, 5 A. & E. 703.

Cartwright, Q.C., and *Dymond*, for the Crown, referred to *Regina* v. *Brierly*, 14 Ont. R. 525.

TORONTO, June 29, 1895.

MEREDITH, C.J. [after stating the facts as above]—

I am of opinion that the evidence referred to was not such

corroboration as sec. 684 requires; that the signatures in question and the names in the book were in the same handwriting in no way implicated the accused, unless it was shown that the names in the book were written by the accused, and the only evidence of that was the evidence of Davis.

It is clear, therefore, that Davis was the only witness who implicated the accused, and that there was no such corroboration of his evidence as is required to justify a conviction.

Both of the convictions must, therefore, be quashed.

ROSE, J., concurred

Convictions quashed.

Note: *Corroboration of Evidence of Forgery—Cr. Code 684.*

In *R.* v. *Giles*, (1856) 6 U.C.C.P. 84, the prisoner, Elizabeth Giles, was charged with forging an order for the delivery of goods. The only persons who gave evidence at the trial were the person whose name was alleged to have been forged, and the person to whom the order was addressed. The person whose name was alleged to have been forged denied the signature and also swore that he could not write; but the person to whom the order was presented by the prisoner, and who had supplied her with goods on the faith of same, was not aware of that, and accepted the order in good faith. The order purported to be a request to let 'the bearer' have goods, and the prisoner, on presenting it, gave a fictitious name. In delivering the judgment of the Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.) the Chief Justice said:—"The false represen-"tation made by prisoner as to her own name would be a "very material fact to establish a guilty knowledge on her "part, if the fact that the note was forged were established; "but, until that is done, this false statement wants signifi-"cance, and I think it would be going too far to treat [it] as "a corroboration of the statement of Aikenhead [the party "whose name was alleged to have been forged] that the

Note—*Continued.*

"order was a forgery. . . . There is no corroboration of his "testimony, i.e., there is no material fact proved by him "which is proved either by other direct testimony, or by the "proof of other facts which go to establish the truth of any "material part of his statements."

[SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND TASCHEREAU, SEDGEWICK, KING AND GIROUARD, JJ.

MAJOR v. McCRANEY.

Agreement for stifling prosecution—Theft by partner—Trustee —Property held upon express trust—Misappropriation— Security by third parties for repayment—20 and 21 Vict., c. 54, s. 12 (Imp.)—Quære, if in force in British Columbia—Cr. Code 311, 363, 981.

1. All agreements to suppress criminal prosecutions are illegal in the absence of any statutory provision to the contrary.
2. A covenant for the payment of money, given by the accused and others for the purpose of stifling a prosecution for the alleged embezzlement, prior to the Criminal Code, of partnership property under the Larceny Act R.S.C., c. 164, s. 58 (see Criminal Code 311), is not enforceable.
3. The Imperial Act, 20 and 21 Vict., c. 54, s. 12, if it be still in force in British Columbia, which it did not become necessary to decide, applies only to trustees guilty of misappropriation of property held upon *express* trusts, and validates an agreement or security given by such a defaulting trustee himself, having for its object the restoration or repayment of any trust property misappropriated, and not an agreement or security given by third parties under no civil obligation to the party wronged, for the purpose of stifling the prosecution.

ARGUED: May 18, 1898.

DECIDED: November 21, 1898.

Appeal by the plaintiff from a decision of the Supreme Court of British Columbia reversing the judgment at the trial in favour of the plaintiff.

The action was brought on a covenant contained in an agreement under seal, dated the 25th day of October, 1894, by which the defendants, H. P. McCraney and others, covenanted to pay to the plaintiff $7,000.00 at the end of three years from its date, with interest at 8 per cent.

The defence set up is that the agreement was executed in consideration that a criminal prosecution would be stifled.

The plaintiff claims that on the evidence no offence under the Criminal Code was disclosed and there could, therefore, be no abandonment of the prosecution. He also contended that under the Imperial Act, 20 & 21 Vict., ch. 54, sec. 12, such defence could not be set up as against misappropriation of trust funds.

The action was tried at New Westminster on the 22nd and 23rd of February, 1897, before Davie, C.J., who delivered judgment as follows on the last-mentioned date:

DAVIE, C.J.—If it is admitted that section 12 of 20 & 21 Vic., Cap. 54 (Imp.), is in force, there seems to be no defence to this action. It has not been argued that section 12 is inapplicable, but only that its provisions do not cover this case, in that H. P. McCraney was punishable, or might have been proceeded against under other sections of the Code, and, moreover, that the agreement might be valid as regards the debtor himself, but void as against the sureties. I am unable to assent to either of these propositions. The information laid against H. P. McCraney was for the distinct charge of being a defaulting trustee. But, apart from that fact, whilst it is perfectly true that a defaulting trustee might be proceeded against under other sections of the Code than 363, yet the fact could never have been lost sight of that his alleged peculations occurred in his character of trustee, that he was a trustee in fact, and, as alleged, a defaulting trustee. His crime (if any) was in that character, and it is to the defalcations of trustees that section 12 applies, and says distinctly that nothing in the Act is to prevent any agreement or security by a defaulting trustee for repaying or restoring trust property misappropriated.

Misappropriation by a trustee was for the first time made an offence cognizable under the criminal law by the statute, of which section 12 is one section. The offence is created by section 1, which is in almost identical terms with section 363 of the Criminal Code. Section 363 is a mere reproduction of section 1 of 20 & 21 Vic., Cap. 54. According to the well-known principle laid down in *Waterlow* v. *Dobson*, 27 L.J.Q.B. 55, Acts *in pari materia* are to be read together, and the Code is to be read therefore as if section 12 was incorporated with it. The contention that the agreement, although valid as against the principal, is illegal and void as against the sureties, is, in my opinion, equally untenable. Section 12, I think, is not capable of bearing such a narrow construction. It is true that it refers to securities "given by the debtor," but surely this includes the sureties which he gives. If it is legal for the debtor to give sureties, how can it be illegal for the sureties themselves to enter into the suretyship? It has not been argued that section 12 has been repealed or modified in any way, or that the Code is in any way repugnant to it; nor do I think that any such contention could be successfully set up. Rev. Stat. Can. Cap. 144, Sec. 2, distinctly applies the criminal laws of England, in force prior to 1858, to British Columbia, except as repealed, modified or altered by subsequent competent legislation.

I was quite prepared to hold, but for section 12, that the plaintiff's case failed under *Williams* v. *Bayley*, L.R. 1 H. of L. 290; *Kier* v. *Leeman*, 9 Q.B. 371; *Egerton* v. *Brownlow*, 4 H. L. Cas. 1, and other cases cited in the argument, shewing that a security given in pursuance of an agreement for stifling a prosecution (which this undoubtedly was) is utterly void. But section 12, of which I confess I was altogether unaware but for Mr. McPhillips' industry in unearthing it, expressly permits, in the case of trustees, that which the authorities cited shew would otherwise be contrary to public policy and void.

I, therefore, hold the contract in this case to be valid, and I give judgment in the amount claimed, with costs.

From this judgment the defendant appealed to the Full Court, consisting of McCREIGHT, WALKEM and DRAKE, JJ., who reversed the judgment at trial and dismissed the action.

Their judgments, delivered on July 31st, 1897, were as follows:

McCREIGHT, J.—This is an action on a deed given to the plaintiff by the defendants, on the 25th day of October, A.D. 1894, whereby, among other provisions, the defendant, H. P. McCraney and the other defendants, covenanted to pay the plaintiff the sum of $7,000.00 at the end of three years, and in the meantime to pay interest thereon at the rate of eight per cent per annum, as therein mentioned, and this action is brought for a half year's interest on the said sum of $7,000.00.

The defence, so far as it is material, is that the said deed was given to the plaintiff for an illegal consideration, that is, to stifle a prosecution for breach of trust by the defendant, H. P. McCraney, who was then a trustee for the plaintiff and T. R. Pearson, of an undivided share in certain lands, as to which he, the said H. P. McCraney, was also owner of the other one-half share; and notwithstanding such trusteeship as to the said half share of the plaintiff and T. R. Pearson, he, the defendant, H. P. McCraney, in November, 1892, without the knowledge or consent of the plaintiff, unlawfully and with intent to defraud, converted to the use of him, the said H. P. McCraney, the said half share of the said plaintiff and T. R. Pearson, by executing a mortgage upon the entirety of the said land for the sum of $5,000.00, to one A. Neil McLean, and receiving the said monies and converting the same to his own use.

From the evidence, it seems that the plaintiff and T. R. Pearson, and H. P. McCraney, had been in partnership together for the purpose of buying and selling land, and sharing the profits, and in this way he, H. P. McCraney, I gather, held the legal estate of the entirety of the said lands, by which he was enabled to mortgage such entirety without the knowledge or consent of the plaintiff and T. R. Pearson. The partnership expired or ceased to exist at the end of 1891,

and the action of H. P. McCraney in executing the said mortgage of the entirety, on the 17th of November, 1892, was manifestly illegal, and whether it was also criminal should now be examined ; but a previous question was raised whether, assuming it to be a criminal breach of trust, the proviso in section 12 of 20 & 21 Vic., Cap. 54 (Imp.), which was alleged to be in force in British Columbia, did, notwithstanding, permit an instrument like the present to be given by the defaulting trustee and his sureties, and an action to be maintained thereon.

From the language of Rev. Stat. Can., Cap. 144, it might be, or at least it was in the Court below, successfully contended that the above statute, section 12, was still in force. No allusion seems to have been there made to 37 Vic., Cap. 42, Sec. 7 (Can.), and that Act generally, nor to the Rev. Stat. Can., Cap. 164, Sec. 72, which section 72 and the sections therein referred to contained the law as to criminal breaches of trust until Cap. 164 was in turn repealed by the Criminal Code of 1892, which contains in section 363 the law now in force on the subject, and is silent as to agreements always at common law considered illegal, and contrary to public policy.

On perusing section 363 a difficulty arises in consequence of section 3 (*bb.*) of the Code, which provides that "the expression 'trustee' means a trustee on some express trust created by some deed, will or instrument in writing, or by parol, or otherwise," etc. Now the evidence in this case by no means discloses an express trust, but on the contrary negatives it. I gather H. P. McCraney bought this land for partnership purposes during the partnership, and it seems he made the mortgage complained of and the misappropriation of the proceeds in November, 1892, after the partnership had expired. After such expiring, there would be only an implied trust at most, on his part, for the plaintiff and Pearson, and section 363 of the Code would not be satisfied, or it would be inapplicable to the present case. The case of *Knox* v. *Gye*, L.R. 5 H.L. 656, seems to make a further difficulty in the way of holding that H. P. McCraney was a

trustee for the plaintiff and T. R. Pearson, because that case seems to shew that, after the dissolution of the partnership, the legal relations of the former partners to each other is not that of a trustee and a *cestui que trust*; see the argument of Messrs. Jessel and Lindley at p. 670, and per Lord Westbury at pp. 675 and 676, and Lord Chelmsford at pp. 685 and 686, contrary to what was said by Lord Hatherley at pp. 678 and 679, and pp. 681 and 682.

At first I relied much more on section 58 of Cap. 164 of the Revised Statutes already referred to than on the sections dealing with original breaches of trust either in that Act or in the Code, and I thought the present case fell within the second member of the above section 58, which deals with the case of "one of two mere beneficial owners of money or other property stealing, etc., or unlawfully converting the same, or any part thereof, to his own use," but on looking further it seems that there is no provision in the Code similar to the said section 58 of Cap. 164.

If there was no other consideration for the giving of the deed of 25th October, 1894, than that disclosed by the defence of stifling the prosecution for the unauthorized mortgage and misappropriation of the proceeds, it might be difficult to hold that there was a good bar to the action. The parties to the deed would in that case appear to be in a position similar to that of the plaintiff in *Davies* v. *Otty*, 35 Beav. 208, where he made a conveyance intending to prevent a forfeiture to the Crown in case he should be convicted of bigamy, and it turned out that he was mistaken in supposing he had committed an offence, and the Master of the Rolls held that there was nothing to prevent him from recovering the land from the party to whom he had made the conveyance whilst labouring under the mistake. But the evidence here shews that the mortgage transaction was only one of six or seven criminal charges which might have been brought against H. P. McCraney, and in respect of which no doubt it was intended that prosecutions were to be stifled, as well as that appearing in the pleadings in

this case. (After discussing the evidence on this point, the learned Judge proceeded):

The portions of the evidence to which I have referred, and I think there are others, leave no doubt there were other criminal charges, and the deed was given to stifle prosecutions therefor. From the form of the pleadings in the well-known case of *Collins* v. *Plantern*, 1 Sm. L.C. 355, it seems not necessary for the defence to aver that the charges could be proved; indeed, the successful stifling of the prosecution of course would render such proof impracticable. In *Meriden Brittania Co.* v. *Bowell*, 4 B.C.R. 520, we have a case dealing with stifling of criminal prosecutions; at page 524 in the judgment, there is the following quotation from the judgment of Lindley, L.J., in *Scott* v. *Brown*, 67 L.T.N.S., at p. 783: "No Court ought to allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, etc., and it matters not whether the defendant has pleaded the illegality, or whether he has not." This observation applies to the present case.

Costs were dealt with at the time of giving the oral judgment in the Full Court, and I have only to add that I think the plaintiff's action cannot be maintained, and the decision of the learned Trial Judge must be reversed, but without costs of the appeal. I forgot to refer to an argument by the plaintiff's counsel to the effect that the Federal Legislature had no power to repeal the proviso to section 12 of 20 & 21 Vic., Cap. 54 (Imp.), as that was a matter appertaining to civil rights in British Columbia. But I think the case of *Cushing* v. *Dupuy*, 5 App. Cas. 409, affords a complete answer to this argument. There would be but little use in the British North America Act assigning the subject of criminal procedure to the Federal Legislature, if the Provincial Legislature had substantially the power of embarrassing the prosecution of grave crimes by allowing agreements calculated to stifle prosecutions, and actions thereon to be maintained. The Federal Legislature certainly has the power to regulate the restitution of property obtained by

theft or false pretences. Forfeitures by escheat or attainder, deodands and such like are subjects affecting civil rights as much as the proviso to the above-mentioned section 12, as introduced into British Columbia by the English Law Ordinance, 1867 (R.L.B.C. 1871, No. 70).

WALKEM, J., concurred with MCCREIGHT, J.

DRAKE, J.—The learned Chief Justice who tried the case came to the conclusion that the agreement set out in the evidence was made in fact for the stifling of a prosecution; and in this view I think he was quite right. Whether section 363 of the Code relating to frauds by trustees is applicable or not to the case of a partner defrauding his co-partner does not call for our decision. There are other sections in the Code relating to theft, especially section 311, which would be sufficient to cover the charge made against McCraney, if proved. Under these circumstances, it is not necessary to discuss the effect of section 363. The evidence clearly discloses that there was a formal prosecution properly instituted; that in order to obtain the withdrawal of this prosecution the defendants entered into a deed whereby they agreed to pay the prosecution the sum of $7,000.00, and it is of little consequence whether there were other terms in the agreement involving the dealing with lands which were a protection *pro tanto* for the persons who were bound to the plaintiff. The point on which the Chief Justice (while admitting the validity of the objection of the impeached contract) decided in favour of the plaintiff was the contention by Mr. McPhillips that section 12 of 20 & 21 Vic., Cap. 54 (Imp.), which was made law in British Columbia by No. 70, R.L.B.C., 1871, applied, and what has been done was covered by that section. It will answer no useful purpose to discuss the extent and bearing of that section, because the Act in which it is contained is no longer in force, and this is decisively shewn by a reference to the course of legislation dealing with the criminal law.

The Dominion Parliament after Confederation introduced

into this Province the 32 & 33 Vic., Cap. 21, and section 87 of that Act is similar to section 12 of 20 & 21 Vic., Cap. 54 (Imp.) And by Schedule A to Rev. Stat. Can., 1886, p. 19, so much of the ordinance which was passed by British Columbia on 6th March, 1867, as relates to the adoption of the English criminal law, was repealed. It was under this Act of 6th March, 1867, that the 20 & 21 Vic., Cap. 54 (Imp.), was adopted by Provincial law. Under the British North America Act the Dominion Parliament has the control of the criminal law, and by section 129 the existing laws of the Confederated Provinces only continue until repealed and abolished or altered by the Parliament of Canada and the Legislature of the respective Provinces, according to the authority of the Parliament or the Legislature under the authority of that Act. The result is that 32 & 33 Vic., Cap. 21, remained the law until altered by the Criminal Code. The section in question is omitted in the Code, and all the existing criminal laws of the Dominion were repealed by the Code.

I do not consider that the defendants, by raising the defence they have, are entitled to much consideration from the Court. They entered into a liability presumably with the intention of carrying it out, but their views have changed and they now assert that their deed was contrary to public policy, and that they should not be invited to fulfil their obligations. The case of *Jones* v. *Merionethshire Permanent Building Society* (1892) 1 Ch. 173, at p. 187, is in many respects a similar case, and there the Court refused them their costs of appeal, and in my opinion the same course should be followed here. The appeal should be allowed without costs. The defendants will be entitled to their costs of action.

The plaintiff thereupon appealed from the judgment of the Supreme Court of British Columbia to the Supreme Court of Canada.

Robinson, Q.C., for the appellant.

Chrysler, Q.C., for the respondents.

OTTAWA, November 21, 1898.

The judgment of the Supreme Court of Canada was delivered by

THE CHIEF JUSTICE,—

I am of the opinion that this appeal must be dismissed.

It was found by both the courts below that the covenant of the 25th of October, 1894, upon which this action is brought, was given for the express purpose of stifling a prosecution against H. P. McCraney for certain statutory offences with which he was charged in respect of the embezzlement or misappropriation of the assets of a partnership firm of which he had formerly been a member, and which was comprised of the present appellant, H. P. McCraney and Thomas Robson Pearson. The evidence is so strong as to leave no doubt that the abandonment by the appellent of the prosecution which had been instituted and under which H. P. McCraney was then in prison, having been on a preliminary examination committed for trial by a police magistrate, was the express object which the respondents had in view in executing the covenant in question.

The principal question which has been raised is as to the application of an Imperial enactment (the 12th section of 20 & 21 Vict., ch. 54) to the case. It is said that this provision was in force in British Columbia at the time the covenant in question was given, and that it validates a transaction which but for it would be confessedly illegal and void.

The Act in question which made a breach of trust a criminal act provides that: "Nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act shall prevent, lessen or impeach any remedy at law or in equity which any party aggrived by any offence against this Act might have had if this Act had not been passed, but no conviction of any such offender shall be received in evidence in any action of law or suit in equity against him, and nothing in this Act contained shall affect or prejudice any

agreement entered into or security given by any trustee having for its object the restoration or repayment of any trust property misappropriated" (20 & 21 Vict., ch. 54, s. 12).

It has been contended in argument here that the Imperial Act referred to and consequently the 12th section just set forth, was not in force in British Columbia when the Acts for which H. P. McCraney had been prosecuted or threatened with prosecution were committed and when the covenant was given.

It is in my view not material to the decision of the present appeal to inquire whether the Act in question was in force or not.

The statute in question would not, in my opinion, have applied to authorize such a prosecution as that which had been instituted against McCraney. The class of trustees referred to in the Act were trustees who had been guilty of misappropriation of property held upon express trusts.

From the evidence it appears that there was *primâ facie* a case warranting a prosecution against McCraney under the 58th section of the Revised Statutes of Canada, ch. 164, which enacts that:—"Every one who, being a member of any co-partnetship owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully converts the same or any part thereof to his own use or that of any person other than the owner, is liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership or one of such beneficial owners."

This section was not re-enacted in the Dominion Act known as "The Criminal Code (1892)" and the Act in which it was contained was by that legislation repealed.

The acts however charged against H. P. McCraney and for which he was threatened with criminal prosecution, and for one of which he had actually been imprisoned, and was in prison at the time the covenant in question was executed, had been committed in 1892, the co-partnership having been

dissolved in 1891. Then the second sub-section of section 981 of the Criminal Code expressly reserves the liability to criminal prosecutions and punishment for acts committed under the repealed statutes, a list of which is contained in a schedule to the Act which includes chapter 164.

The Criminal Code itself did not, by the express provision in its second section, come into force until the 1st of July, 1893, so that whilst it was in force at the date of the prosecution and the execution of the impeached agreement, it was not in force when the alleged criminal acts were committed and is therefore entirely without relevance in the present case.

Of course it is out of the question to say that section 12 of the Imperial statute, if in force in British Columbia, could apply to a prosecution for an offence under section 58 of the Larceny Act (ch. 264 Revised Statutes of Canada).

That the offences with which McCraney was charged, embezzling the money raised by a mortgage of partnership lands and other moneys obtained by drawing on the partnership bank account, were criminal acts within section 58 of chapter 164 Revised Statutes of Canada, is too plain to require demonstration. Therefore an agreement to stifle a prosecution for these alleged acts must, in the absence of any statutory provision to the contrary, have been illegal as in contravention of the rule of the common law which declares illegal all agreements to suppress criminal prosecutions.

Returning to section 12 of the Imperial Act I must say that even if that section were in force and applied to a case like the present, it appears to me that the judgment of the late learned Chief Justice of British Columbia was wrong in the construction which he placed upon the 12th section, for it appears very plainly to me that the enactment whilst it did provide that the civil remedies of a *cestui que trust* who had been defrauded should not be interfered with by the statute, and that he should be at liberty to accept reparation and restoration of the trust fund and securities therefor, did not

authorize an express agreement to forbear criminal prosecution. Further, this section 12 would seem to be restricted to agreements or securities given by the defaulting trustee himself, and not to those given by third persons under no civil liability to the *cestui que trust* for the avowed purpose of saving him from criminal responsibility.

For the general law as to the illegality of agreements to stifle prosecutions I refer to *Jones* v. *Merionethshire Permanent Benefit Building Society*, (1892) 1 Ch. 173, and to *Flower* v. *Sadler*, 10 Q.B.D. 572. In the first case there are important observations upon the difference between securities given by the wrongdoer himself by way of reparation and those given by third parties under no civil obligation to the party wronged, merely for the purpose of stifling the prosecution. I do not think that by section 12 it was intended to legalize securities of the last class.

The appeal must be dismissed and I see no reason why it should not be dismissed with costs.

Appeal dismissed with costs.

Note: *Agreement for stifling a prosecution—When implied—Illegality.*

In *Jones* v. *Merionethshire Permanent* (1892) 1 Ch. 173 [affirming (1891) 2 Ch. 587], referred to in the above judgment, the facts shown were that the secretary of a building society, who had made default in accounting for money paid to him, was threatened by the society with a prosecution for embezzlement. He thereupon applied to certain relatives for assistance, and they gave a written undertaking to the society to make good the greater part of the amount due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the sum for which the relatives made themselves responsible. In pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The relatives in giving the undertaking were actuated by a desire to prevent the prosecution, and that was known

Note—*Continued.*

to the directors of the society, but no express promise was made that there should be no prosecution. It was held by the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.,) that it was an implied term of the agreement that there should be no prosecution; that the agreement was, therefore, founded on an illegal consideration and void; and that the society could not recover on the promissiory notes or enforce the securities. Bowen, L.J., there said:—"Reparation is a "duty which the offender owes quite independently of his "fear of prosecution or otherwise, and it would be absurd "to lay down as an impossible counsel of perfection, that the "relative of an offender, and his friends are not justified, "nay, even are not bound, in certain instances, to assist him "to make reparation to those whom he has injured. . . . The "law certainly is not anxious to discourage reparation; but "you must come back, after reparation made, to the one "dominant test in each case. It is a circumstance which "may be lawfully taken into consideration that the offender "has done his best himself, or with the assistance of his "friends, to make good his wrong. But the test is, what is "the moral duty of the person who has been injured to him-"self and to others? He must make no bargain about that. "If reparation takes the form of a bargain then, to my "mind, the bargain is one which the court will not enforce."

The mere *expectation* on the part of the relatives who aid the offender to make reparation that a prosecution would not take place, would not be sufficient to nullify the transaction; *Ward* v. *Lloyd*, 6 Man. & G. 785. In order to amount to a defence on the ground of illegality there must be an *agreement* not to prosecute. *Jones* v. *Merionethshire* (1892) 1 Ch. 173, 182, per Lindley, L.J.

And if, upon discovering that bank notes or bills of exchange had been forged, they are sent back to the person from whom they had been received, and others that were valid got in their stead, the consideration for the latter is not corrupt and illegal, and they can be rendered available in the hands of those whose object in getting possession of

Note—*Continued.*

them was merely to exchange securities that were forged for others that were not, if there was no bargaining to stifle a prosecution. *Wallace* v. *Hardacre* 1 Camp. 45.

There is no distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal, and does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor, although the transaction out of which the debt arrises possibly involves a criminal as well as a civil liability. *Flower* v. *Sadler* (1882), 10 Q.B.D. 572, 576 (C.A.).

If the agreement be made upon the understanding that the accused shall be discharged from custody, although not so stated in express terms, it is illegal and void. *Leggatt* v. *Brown* (1898) 29 Ont. R. 530, affirmed (1899) 30 Ont. R. 225.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J.,C.P., ROSE AND MACMAHON, JJ.

Re MURPHY.

Extradition — Uttering forged document — Forgery — 'False document' — Offence which would, if committed in Canada, constitute the crime—Proof of foreign law unnecessary — Habeas corpus — Return to writ — Defective warrant of commitment—Supplementary return of fresh warrant—Perusal of depositions—Power to remand—Extradition Act R.S.C. (1886), c. 142, secs. 2 (b), 11—Cr. Code 421, 422, 424.

1. Upon a commitment in extradition proceedings there is no jurisdiction other than that which is conferred by statute to take proceedings for the detention of the accused in respect of the crime charged, and the court has no inherent power to remand a prisoner held under a defective warrant.

2. Upon habeas corpus proceedings following a commitment under an extradition warrant, the court is not justified in referring to the depositions returned, and inferring therefrom facts material to the offence, if the warrant of commitment is in itself defective in that it does not recite a finding of such facts.

3. The return to a writ of habeas corpus should be brought into court and there read before it is filed, and a supplementary return of a second warrant of commitment intended to remedy a defect in the first warrant may be read in conjunction with the return of the first warrant as together constituting the return to the writ.

4. Where a fraudulent conspiracy was entered into between two persons in pursuance of which one of them opened an account in a bank in a fictitious name and gave to the other a cheque, for which the latter knew there were no funds, drawn in the fictitious name, and the same was negotiated by the payee in furtherance of such conspiracy by obtaining another bank to cash the same on the faith of its being a genuine cheque, the cheque is a 'false document' both by the Criminal Code (sec. 421) and at common law; and the uttering of same under such circumstances is an extraditable offence under the treaty with the United States of America.

5. When such a state of facts is established in an extradition proceeding under the Extradition Act of Canada as would, if their occurrence had taken place in Canada, have demanded a committal for trial, the duty to commit for extradition arrises under the Extradition Act (R.S.C. 1886, c. 142, s. 11), if the offence charged be one of the offences covered by the treaty with the foreign country.

6. It is unnecessary in such case for the prosecutor to prove that by the law of the foreign country the alleged offence is there a crime of a like designation and within the treaty.

ARGUED: November 23, 1894.
DECIDED: December 5, 1894.

The prisoner, Cornelius F. Murphy, was committed by the Judge of the County Court of the County of Wentworth for extradition on the charge of uttering a forged document at Chicago, Illinois, U.S.A.

A writ of habeas corpus was issued, returnable before the Common Pleas Division; and a writ of certiorari was also issued to bring up all the papers and proceedings before that Court.

On the return of the writs, the writs and return were filed, and the discharge of the prisoner moved for on the grounds set out in the judgment.

TORONTO, November 23, 1894.

Aylesworth, Q.C., and *F. Fitzgerald* for the prisoner: There is no evidence to show that the person who opened the account was Frederick Murphy: *Raynor* v. *German*, 1 F. & F. 700. The evidence entirely fails to establish the identity of the prisoner. There was nothing done here to constitute forgery. The mere assumption of the name of Osborne did not in itself constitute forgery. The effect of the document did not depend on the assumption of the name, for credit was not given to the name, but to the man, no matter what name he bore. The use of the name must be with intent to defraud: Stephen's Digest of Criminal Law, 4th ed., p. 298, article 356. The mere use of a fictitious name to a note will not of itself constitute a forgery where the credit is given wholly to the person making or endorsing it without any regard to the name or any regard to a third person. This is the rule laid down in 1 Leach, C.C. 59, and followed in *Regina* v. *Martin*, 5 Q.B.D. 34. A man may go to Australia, or some foreign country, and, apart from any

intention to defraud, as for instance, to prevent his whereabouts being known to his family, may use an assumed name. This of itself would not render him guilty of forgery. If Murphy had used his own name, this, of course, would not be forgery; can therefore his using the name of Osborne, without anything else being done, be evidence of the offence? Section 421 of the Criminal Code does not interfere with the rule so laid down; and section 422 does not apply because, if there is no forgery, there can be no uttering. In *Re Sherman*, 19 Ont. R. 315, the mere use by the prisoner of the name of S. & Co., was held not to constitute forgery. The next point is that to constitute the crime of forgery within the Extradition Acts, there must be forgery according to the law of the place where the offence was committed. Here there is no evidence to show that there was any forgery committed according to the law of the State of Illinois, and, in fact, according to the law of that state, no forgery was committed. In *Re Bellencontre*, (1891) 2 Q.B. 122, it is laid down that in order to justify the extradition of the subject for a forgery, there must be evidence of an act committed by him in the foreign country amounting to an offence against the law of such country, and which if committed in England, would amount to an offence against English law: See also *Re Phipps*, 8 Ont. App. 77; *Regina* v. *Lavaudier*, 15 Cox C.C. 329; *Re Windsor*, 6 B. & S. 522, 528; Moore on Extradition, 648. The defendant being a British subject is not liable to extradition: Article in 64 Law Times Journal, p. 130. The warrant of commitment is also defective as it states that the person had been 'convicted,' while the evidence shows that he had only been 'accused' of the alleged offence: *Re Asher Warner*, 1 Can. Law Jour. 16. There is no power to amend the warrant after the return to the certiorari: *Regina* v. *MacKenzie*, 6 Ont. R. 165.

Bruce, Q.C., and *Crerar*, Q.C., contra: With regard to the last point raised, there is no difficulty arising from the use of the word "convicted" instead of "accused." The material question is, does the evidence disclose an offence

for which the defendant can be extradited. If it does, the Court can remand the prisoner for extradition. The evidence is the substance, the statement in the warrant is merely a matter of form. Here the evidence clearly discloses an offence which renders the defendant liable to extradition. There was here, however, a supplementary return made by the gaoler, and both these returns are before the Court, and the Court can act on the later return. The Court has also the power to allow the return to be amended, so as to have the proper warrant sent up. The prisoner is being held on the new warrant, and nothing would be gained by his discharge for any defect in the first warrant, as he would be immediately brought up on the new warrant: *Re Martin*, 4 Can. Law Jour. 199, 200; *Re Parker*, 19 Ont. R. 612; *Re Smith*, 3 H. & N. 227; *Re Swire*, 30 Ch. D. 239; *Re Anderson*, 20 U.C.R. 124, 11 U.C.C.P. 9, at pp. 65, 68. The fact of the defendant being a British subject is no answer to proceedings for extradition. This is laid down in *Re Burley*, 1 Can. Law Jour. 34, where it is said that the Act extends to British subjects committing the offence named in the treaty in the territory of the United States, and then becoming fugitives to Canada. It is not necessary to prove the foreign law; all that the Acts require is that the offence should be forgery according to the law of this country: *Re Smith*, 4 Ont. Pr. 215; *Regina* v. *Hovey*, 8 Ont. Pr. 345; *Re Caldwell*, 5 Ont. Pr. 217; *Re Burley*, 1 Can. Law Jour. at p. 45; *Regina* v. *Morton*, 19 U.C.C.P. 9, 25; Moore on Extradition, p. 646, sec. 429; *Re Phipps*, 1 Ont. R. 586, 8 Ont. App. 77; Act of 1890, article 1. The evidence returned clearly disclosed the offence of forgery. It shows that the name of Osborne was a fictitious name, and that it was used with intent to defraud. This is all that is necessary to constitute the charge of forgery, and distinguishes the case from *Regina* v. *Martin*, 5 Q.B.D. 34. There was clear evidence of the identity of the prisoner.

TORONTO, December 5, 1894.

MEREDITH, C.J.—

The prisoner has been, under the provisions of the Extradition Act, committed by the Judge of the County Court of the County of Wentworth for the extradition crime of uttering a forged instrument, the forged instrument being a cheque purporting to be drawn by Robert Osborne on the Bank of Commerce of Chicago for $1,350.

It is objected for the prisoner on the motion for his discharge—

1. That in the warrant of commitment the ground of the determination of the judge is stated to be that the prisoner had been "convicted," while the evidence shows that he had not been convicted, but only "accused" of the extradition crime.

2. That no evidence was given to show that the offence with which the prisoner is charged amounts to uttering a forged instument according to the law of the State of Illinois, in which State the offence is alleged to have been committed (but the contrary is shown).

3. That the evidence did not disclose the commission by the prisoner of the extradition crime of which he is accused.

I am of opinion that none of these objections ought to prevail.

The first objection is a purely formal one, and we ought not to give effect to it unless it appears clearly that we are bound to do so according to law and the practice of the Court.

I do not think that if the warrant of commitment be defective we can, in such a case as this, look at the depositions returned, and if we find from them that an extradition crime has been committed remand the prisoner, as was done by the Court of Queen's Bench in *Re Anderson*, 20 U.C.R. 124.

The power of the Court to do this was fully considered by the Court of Common Pleas in the case of the same

prisoner: *Re Anderson*, 11 U.C.C.P. 9; and the decision was against the existence of such a power.

The Court of Queen's Bench had, in the case before it, assumed to exercise the power of remanding, but it was pointed out by the Court of Common Pleas that in doing so it had acted upon a rule which, though applicable to cases where the court was acting with reference to a crime committed in the province and therefore by reason of its jurisdiction as a court over the offence it had inherent power to remand, was not applicable to the case of a commitment for extradition, because in such a case there was no jurisdiction over the individual, except such as was given by the Act of Parliament, and the warrant was the only authority for the detention of the prisoner.

There is, however, in my opinion, no doubt that the court has power to permit the return to the writ to be amended, and to allow it to be taken off the files in order that the amendment may be made: *Leonard Watson's case*, 9 A. & E. 731; *Regina* v. *Reno and Anderson*, 4 Ont. Pr. 281; and if in this case the supplementary return made by the gaoler is not properly before us we should now give leave to take the return off the files in order that it may be amended by returning the second warrant, to which I shall afterwards refer, as one of the causes of the prisoner's detention.

I do not think, however, that any amendment of the return is necessary.

The gaoler has returned the original warrant of commitment, and, by a supplementary return, a second warrant proper in form, and both of these returns were before the Court when the motion for the discharge of the prisoner was made.

The proper practice on the return of a writ of *habeas corpus* appears to be to bring into Court and read the return, whereupon, and not before, it is to be filed by the proper officer: *Re Reno and Anderson*, 4 Ont. Pr. 281, at p. 291.

If that practice had been followed here, the writ, with the return and the supplementary return, would have been

brought into Court and read together, and we must, I think, deal with this case as if that had been done; and I can see no reason, therefore, why the return and the supplementary return may not be treated as one, and as the return to the writ.

The first objection, therefore, in my opinion, cannot be sustained.

It will be more convenient to consider the third objection before dealing with the second.

The question raised by the third objection is substantially this—Was the evidence produced, as the 11th section of the Act requires, such as would, according to the law of Canada, subject to the provisions of the Act, have justified the committal of the prisoner for trial if the crime had been committed in Canada?

There was, in my opinion, evidence to go to a jury to support the following conclusions of fact:

1. That the prisoner on the 19th September, 1894, obtained from the First National Bank of Chicago $1,350, upon a cheque for that amount purporting to have been drawn by Robert Osborne on the Bank of Commerce of Chicago payable to the prisoner's order.

2. That no such person as Robert Osborne had any existence in fact, and that this was known to the prisoner.

3. That there were to the knowledge of the prisoner no funds to meet the cheque, and that his purpose in negotiating it was to defraud the First National Bank of Chicago.

4. That the cheque was signed by Frederick Murphy, a brother of the prisoner, with the name of Robert Osborne, he knowing of the fraudulent use to which it was intended to put it, and for the purpose of carrying out the fraud.

5. That the making and negotiating of the cheque were the result of a fraudulent conspiracy entered into between the prisoner and his brother Frederick, in pursuance of which the brother opened an account with the Bank of Commerce in the name of Robert Osborne; and that at the time he assumed the false name he did so to the knowledge of the prisoner for the purpose of carrying out the fraud

which was ultimately perpetrated upon the First National Bank, or some fraud of a like nature.

6. That the Bank of Commerce was induced by the representations of the prisoner to believe, and did believe, that the person with whom the account with them was opened was known to the prisoner; that his real name was Robert Osborne, and that he had been well and favourably known to the prisoner in Toronto, the last two of which statements were untrue.

7. That the payments and withdrawals from the Bank of Commerce in connection with the Robert Osborne account were made to appear to be the result of real transactions between Osborne and other persons, but were, in fact, fictitious transactions, and that this was done in furtherance of the fraudulent scheme, and to enable the parties more surely to accomplish their fraudulent purpose.

I do not say that these conclusions must necessarily be drawn from the facts proved, but it is sufficient for the purposes of the present inquiry that a jury on the trial of the prisoner may draw them.

The next question is :—Such evidence having been given, does it justify the committal of the prisoner for the "extradition crime" with which he is charged, viz., uttering a forged instrument?—and I have no doubt that it does.

Section 422 of the Criminal Code, 1892, defines "forgery" to be the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one, whether within Canada or not, or that some person should be induced by the belief that it is genuine to do or refrain from doing anything whether within Canada or not.

Section 421 declares that the expression "false document" means :—(*a*) a document the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the

person who purports to make it, is falsely dated as to time or place of making, where either is material; (*b*) a document the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist.

This section contains other sub-heads of definition, which it is not necessary to refer to.

Section 424 is the section which deals with the crime of uttering forged documents; and it provides that anyone who, knowing a document to be forged, uses, deals with, or acts upon it, or attempts to use, deal with, or act upon it, or causes or attempts to cause any person to use, deal with, or act upon it as if it were genuine, shall be guilty of an indictable offence, and be liable to the same punishment as if he had forged the document.

Applying the provisions of these sections, then, to the evidence it would seem to be clear that, if the cheque be a "false document," "the extradition crime" charged is made out.

It was urged on behalf of the prisoner that the alleged incriminating act did not amount to uttering a forged instrument, because, as was said, the account in the Bank of Commerce was a real account, and the prisoner's brother had, for the purpose of keeping it, the right to assume and use the name of Robert Osborne or any other name he chose to adopt; and because the First National Bank did not know Robert Osborne or give credit with regard to the name or any relation to a third person; and for this position, *Regina* v. *Martin*, 5 Q.B.D. 34, was cited.

The *Martin Case* is, it appears to me, clearly distinguishable. There the reserved case shows that the prisoner in drawing and delivering the cheque to the prosecutor did not do so in the name of or as representing any other person real or fictitious; the cheque was drawn and uttered as his own, and it was received by the prosecutor to whom the prisoner was well known, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert, his

true Christian name. He would equally have got credit had he signed his proper name; the credit was given to the prisoner himself, and not to the name in which the cheque was signed; the cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of William Martin as distinguished from Robert Martin, or of any other person than the prisoner.

The facts of the present case are entirely different. The cheque was not signed in the presence of the officials of the bank; it was passed off, and they accepted it as the cheque of Robert Osborne; and a jury, on the trial of the prisoner may upon the evidence find that the bank gave credit relying upon the cheque being what it purports to be, the cheque of Robert Osborne; and the facts would, as I have said, also warrant a finding that the name of Osborne was assumed for the purpose of perpetrating the fraud which was practiced upon the First National Bank.

In *Rex* v. *Peacock*, 1 R. & R. 278, the Judges were of opinion that where the prisoner is proved to have assumed a false name for the purpose of a pecuniary fraud connected with the forgery, drawing, accepting or endorsing in such false or assumed name is forgery.

In *Rex* v. *Sheppard*, 1 Leach, C. C. 226, the facts were that the prisoner had given in payment for goods bought by him a cheque signed with the name of H. Turner. It appeared that no person of the name of H. Turner kept cash at the banking house on which the cheque was drawn, or lived at the address given by the prisoner. The prisoner was found guilty, but execution was respited on a doubt whether, as the prosecutor had sworn that he gave credit to the prisoner and not to the cheque, he was guilty of forgery. The twelve Judges were unanimously of opinion that the conviction was legal, for it was a false instrument, not drawn by such a person as it purported to be drawn by, and the using of the prisoner's name was only for the purpose of deceiving.

To the same effect are the cases of *Rex* v. *Marshall*, R. & R. 76; *Rex* v. *Whiley*, *ib.* 90, and *Rex* v. *Francis*, *ib.* 209.

The provisions of the Criminal Code, 1892, to which I have referred, seem to require, in order to constitute the crime of forgery, even less to be shown than these cases would render necessary, and the instrument in question here is, in my opinion, a false document within the meaning of section 421, as well as a false document at common law.

Coming then to the second and only remaining objection, the contention on behalf of the prisoner is, that before his committal could properly have been ordered, it was incumbent on the prosecution to establish by evidence that the offence of which he was accused was "uttering a forged instrument" according to the law of the State of Illinois; and that, even if that were not necessary, the evidence given on his behalf showed that the offence was not made out according to the law of that State.

In none of the cases in which the question of the construction of the Extradition Act has been under consideration has the precise point which we are called upon to decide been determined, though in most of them expressions were made use of in the judgments which would appear to indicate that it was the opinion of the learned Judges, who gave utterance to them, that it was necessary in order to justify a committal for an extradition crime to establish by evidence that, by the law of the country in which the offence is alleged to have been committed, the facts proved constituted the crime charged.

In the *Anderson Cases*, to which reference has already been made, the contention was, that, although the offence charged was murder according to the law of the State of Missouri in which the extradition crime was alleged to have been committed, it was not murder according to the law of Canada, because the killing was done in an endeavour to escape from slavery, and would not therefore, had the act been done in Canada, have amounted to murder.

The Court of Queen's Bench declined to give effect to this contention, and remanded the prisoner for extradition.

It will be seen, therefore, that it was not necessary for

the determination of that case to decide the question we have to deal with, and it was not passed upon by the Court of Queen's Bench; and, as has been pointed out by a writer on the subject of extradition, (Clarke on Extradition, 3rd ed., p. 217 (*n*)), the killing in the case under consideration by the Court of Queen's Bench, was murder according to the law of Canada, unless the circumstances under which it took place were such as to justify or excuse the act, which was a question for the consideration of the court in which the trial of the prisoner might ultimately take place.

In *Re Phipps*, 1 Ont. R. 586, 8 Ont. App. 77, the question was whether the acts charged constituted, according to the law of Canada, the crime of forgery. The court of first instance thought that they did, and its decision was upheld by the Court of Appeal.

It was there contended that even if forgery, according to the law of Canada, or forgery in the sense of which that crime was understood and dealt with by the courts of Great Britain and the United States, was not proved to have been committed, yet as the acts proved amounted to forgery according to a statute of the State of Pennsylvania, where they were committed, an extradition crime had been made out; but it became, because of the view which the court took, unnecessary to determine that question.

In the case of *Re Hall*, 8 Ont. App. 31, a similar question to that raised in the *Phipps' Case* was under consideration; and the result was the same as in that case.

In the *Windsor Case*, 6 B. & S. 522, it was held that the crime for which the prisoner was sought to be extradited was not forgery according to the law of England, and although it had been declared by a statute of the State of New York, where the offence was committed, to be forgery, it was not the extradition crime of forgery with which the Ashburton Treaty deals.

In each of the Canadian cases opinions were expressed as to the necessity of showing that the acts charged constituted an extradition crime, according to the law of the country by which extradition of the prisoner was demanded.

In the *Phipps' Case*, 1 Ont. R. at p. 610, Mr. Justice Armour's view of the treaty was that there were two questions to be determined:—(1) Whether the offence charged was in the nature of forgery; (2) Whether it was forgery by the law of the country in which it was committed

And opinions to the like effect were certainly expressed by others of the Judges in that and the other cases, as well as by Cave, J., and Wills, J., in the *Bellencontre Case*, (1891) 2 Q.B. 122.

Contrary opinions were, however, expressed by Patterson, J.A., in the *Phipps' Case*, at p. 117, and by Dorion, C.J., in the *Worm's Case*, 22 L. C. Jurist 109.

We are, as I have said, under these circumstances called upon to decide the point incidentally referred to but not decided in the cases I have mentioned, but now necessary for the decision of this case.

Looking then at the provisions of the statute which we have to construe, was proof of the foreign law necessary to the making out of the extradition crime, for which the surrender of the prisoner is demanded?

I am of opinion that it was not.

The 2nd section (R.S.C. 1886, c. 142, s. 2, sub-section *b*) declares the expression "extradition crime" to mean any crime, which, if committed in Canada or within the jurisdiction of Canada, would, if within the terms of the treaty, be one of the crimes described in the first schedule of the Act.

Number four of the crimes in this schedule is forgery, counterfeiting, or altering or uttering what is forged, counterfeited or altered.

Section 6 provides for the apprehension of a fugitive on "such evidence or after such proceedings as would, in the opinion of the Judge, justify the issue of his warrant, if the crime of which the fugitive is accused or alleged to have been convicted had been committed in Canada."

Section 11 provides that "if in the case of a fugitive accused of an extradition crime such evidence is produced

as would according to the law of Canada, subject to the provisions of this Act, justify his committal for trial if the crime had been committed in Canada, the Judge shall issue his warrant," etc.

And section 24 provides that the list of crimes in the first schedule is to be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of the Act, and as including only such crimes of the descriptions in the Act as are under that law indictable offences.

Having regard to the provisions of these sections, I am of opinion that, so soon as it is established by evidence sufficient for that purpose that a state of facts exist, which, had it existed in Canada, would justify the committal of the fugitive for trial for the offence charged, if it be one of the offences mentioned in the treaty with the foreign country by which the extradition is sought and one of the crimes enumerated in the schedule, the duty to commit under section 11 arises, and it is unnecessary to prove the foreign law in order to show that by that law the fugitive has committed the extradition crime of which he is accused.

Holding then, as I do, that proof of the foreign law was unnecessary, is the prisoner entitled to his discharge on the ground that proof of the foreign law was revelant to the inquiry, and that the evidence adduced on his behalf as to the foreign law established that his offence was not an extradition crime within the meaning of the treaty?

The learned County Court Judge was of opinion that such evidence was irrelevant and therefore inadmissible, though, notwithstanding his ruling to that effect, the evidence of Mr. Mahony as to the law of Illinois was received.

Section 9 of the Act requires the extradition Judge "to receive any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted, is an offence of a political character or is for any other reason not an extradition crime."

It is difficult to see what evidence is referred to as evidence to show that the crime is for any other reason not an extradition crime, unless it be such evidence as was held to be inadmissible in this case; and Mr. Justice Armour in the *Phipps' Case*, p. 611, expressed the opinion that the fugitive was entitled to give and the Judge was bound to receive such evidence. On the other hand, if the interpretation clause is referred to, "extradition crime" is found, as I have already pointed out, to mean a crime which, if committed in Canada or within Canadian jurisdiction, would be one of the crimes described in the first schedule to the Act, which seems to exclude all reference to the foreign law for the purpose of ascertaining whether an extradition crime had been committed; and a practical difficulty would certainly arise from the admission of such evidence if the view of a former Chief Justice of Ontario (Spragge) be correct, that "it is incumbent on the Court to see that the act charged constituted an extradition offence, and, unless it is established as a matter of law that it is so, the accused ought not to be surrendered;" (*Re Hall*, 8 Ont. App. at p. 10), as that would render it necessary for the court to inquire into and finally determine, perhaps upon conflicting evidence, the question as to what the foreign law is.

It is, however, in the view I take of the evidence unnecessary in this case to decide that question.

All that was shown by the evidence of Mr. Mahony was that by the law of Illinois, "if a man were to utter or pass a cheque drawn by another person under a non-existing name, but on a bank in which he was keeping an account," that would not be forgery.

That evidence, it is hardly necessary to point out, falls far short of proving that the prisoner upon the facts of this case might not, according to the laws of Illinois, be properly convicted of the offence with which he is charged; and there is, therefore, no evidence to show that the foreign law differs in any respect from our law as to the nature of the offence of which the prisoner has been guilty (if upon his trial the facts are found in accordance with the *prima facie* case made

out, by the tribunal which has ultimately to pass upon the question of his guilt): see also *Wideman's Case*, referred to in Clarke on Extradition, 3rd ed., pp. 151, 152.

All the objections, therefore, fail, and the prisoner must be remanded.

ROSE and MACMAHON, JJ., concurrred.

Prisoner remanded.

Note: An appeal was taken from the above judgment to the Court of Appeal of Ontario (see the next following case), and the same was dismissed, the court being equally divided.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE THE HON. J. H. HAGARTY, CHIEF JUSTICE OF ONTARIO, AND BURTON, OSLER AND MACLENNAN, JUSTICES OF APPEAL.

Re MURPHY.

Extradition — Forgery — Uttering a false document — Proof of foreign law—Extradition Act (Canada)— Cr. Code 421, 422, 424.

1. Per HAGARTY, C.J.O., and MACLENNAN, J.A.—If such a *prima facie* case is made out in extradition proceedings as would warrant a commital for trial upon a preliminary enquiry before a magistrate under the law of Canada had the charge been that the accused had committed in Canada an offence known by the same name as the extradition crime charged, the prisoner must be extradited, although it is not proved by the prosecution that the alleged offence is a crime under the law of the demanding country.

2. Per BURTON and OSLER, JJ.A.—It is necessary for the prosecution to make out a *prima facie* case that the alleged offence is a crime according to the law of the demanding country as well as under Canadian law.

3. Per BURTON and OSLER, JJ.A.—Where the facts shewn in extradition proceedings for forgery disclose a prima case in respect of an offence which is forgery only by virtue of the extended meaning given to that term by Canadian statutes, it is necessary for the prosecution to prove that the same is also forgery under the law of the foreign country in which the alleged offence was committed.

ARGUED: May 16 and 17, 1895.

DECIDED: June 25, 1895.

Appeal by the prisoner, Cornelius F. Murphy, from the judgment of the judges of the Common Pleas Division of the High Court of Justice reported *ante* page 562.

F. Fitzgerald, for the appellant.

A. Bruce, Q.C., for the respondents.

TORONTO, June 25, 1895.

HAGARTY, C.J.O.—

Apart from all decisions or text-writers' remarks on the question, I should have no hesitation in holding that the

cheque purporting to be signed by R. Osborne, which the utterer offered to the National Bank, knowing it to be signed by his brother, F. Murphy, and that no such person as Osborne existed, and knowing that the assumption by F. Murphy of that name was in direct prosecution of an attempt to defraud, came within the words and meaning of our criminal legislation.

Section 421 of the Code defines a "false document" to be a document purporting to be made by a person who did not make the same, or, a document purporting to be made by some person who did not in fact exist.

I fully agree that a person who has assumed a name different from his true name may for all purposes be bound by contracts or writings made in such assumed name. But where there is the assumption of such name for the express purpose of obtaining credit, by representing such name to be that of an actual person, referred to and falsely stated to be in existence, a cheque or note signed in such name for such purpose, may, I think, be properly designated as a false document.

I think the evidence in this case is open to the drawing of the conclusions stated by the learned Chief Justice. I need not repeat his statement of such conclusions.

It is urged that there was a real existing account in the Bank of Commerce as the account of Robert Osborne, and that cheques thereon in that name had been duly honored, and, if the account had not been then overdrawn, the cheque in question would have been duly honored. But my difficulty is that the opening of such account in that name was the beginning of a fraudulent scheme and arrangement between the two Murphys, to be acted on in the raising of money by false pretences, and by holding out a non-existent person as a real one with a real bank account, and for the express purpose of making notes and cheques in the false name, including the cheque in question. When the prisoner issued it to the National Bank he knew it was a false document, false in the sense that it purported to be made by a non-

existing person, knowing that the name Robert Osborne was written by his brother, F. Murphy.

The late Mr. Justice Stephen (Criminal Law, 5th ed., p. 327) a very high authority, takes this view, at the same time stating that there is no direct authority on the point: "A., personating B., draws a cheque in his assumed name of B., on a bank with which in his assumed name he had opened a genuine account by the actual payment of money to his credit. A. does not make a false document."

He refers to *Regina* v. *Martin*, 5 Q.B.D. 34, as favouring though not deciding his view. He also cites *Regina* v. *Dunn*, 1 Leach C. C. 59. As Sir James Stephen puts the case, his views might be quite right. But if we add to his statement, that the account in the assumed name was opened for the express purpose of enabling the prisoner to commence this fraudulent dealing with fictitious paper, and to raise money on such paper by causing the belief of the existence of the fictitious maker or endorser, I find great difficulty in applying this doctrine as governing this case.

Regina v. *Martin*, 5 Q.B.D. 34, is, as the learned Chief Justice puts it, very clearly distinguishable. Sir A. Cockburn, who tried the case, held that the fact was that Robert Martin, who was well known to the prosecutor, and signed the cheque William Martin, did not get credit by substituting William for Robert, as he would equally have got credit had he signed his true Christian name. On the case reserved, the same learned Judge cited *Regina* v. *Dunn*, 1 Leach C.C. 59, where the Judges held "in all forgeries the instrument supposed to be forged must be a false instrument in itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being given wholly to himself, without any regard to the name, or any relation to a third person."

I think the distinction is clear. The prisoner here gave the cheque as that of Osborne, knowing that there was no such person. I consider it given in furtherance of the

original fraudulent conspiracy or design to establish this fictitious credit in the Bank of Commerce, and to defraud others by representing it as a real account with a real person.

In Roscoe's Digest of the Law of Criminal Evidence, 11th ed., p. 532, it is said: "If the name be an assumed one, then it will be forgery to draw up a document in that name, if the name were assumed for the express purpose of giving an appearance of genuineness to the document and carrying the fraud into effect."

The case of *Rex* v. *Peacock*, R. & R. 278, (cited by Meredith, C.J.C.P.,) is set out in Roscoe. The defendant was indicted for forging a bill of exchange in the name of Thomas White as drawee. He had gone to Newnham where he officiated as curate for two months under the name of White, and obtained cash on a draft drawn in that name. During all the two months he was known as Thomas White. The jury were told that if he had assumed the name for the sole purpose of obtaining the curacy, and it was no part of his original plan to raise money by drawing in a false name, to acquit him; but if they were satisfied that he went to Newnham intending fraudulently to raise money by a bill or bills drawn by him in a false name, and that the bill was drawn in prosecution of such intent, to convict. A case was reserved, and it was held by eleven Judges that where proof is given of the real name, and no proof of any change of name until the time the fraud was committed, it throws the onus on the prisoner to shew that he had before assumed the false name on other occasions, and for other purposes, and also that where a person is proved to have assumed a false name for the purpose of pecuniary fraud connected with the forgery, etc., in such false name, it is forgery.

Rex v. *Whiley*, R. & R. 90, is on the same lines, and the jury were asked if the false name had been assumed with intent to defraud on this draft.

In *Rex* v. *Walker*, cited in Roscoe, at p. 534, it was held that the assumption of the name for the express purpose of

carrying out the forgery, was a necessary ingredient in that class of case.

In *Rex* v. *Bontien* (also in Roscoe, at p. 534) the prisoner was acquitted on proof that a year or so before the alleged forgery in the name of Scott, the prisoner had been known in business by that name in other transactions, the Judges on a case reserved holding that there was not sufficient evidence that he had assumed the name for the purpose of the fraud.

In Roscoe it is stated that "the result of the cases is, that where the fictitious name is assumed for the purposes of the fraud, the offence of forgery may be proved, but not where the credit is given solely to the person without any regard to the name, as in *Regina* v. *Martin*."

In Russell on Crimes, 5th ed., p. 648, the cases are discussed, and, as far as I can see, the same view is taken as in Roscoe.

In *Regina* v. *Whyte*, 5 Cox C.C. 290, the same view is adopted, that the name must be assumed with a view of defrauding by issuing false bills of exchange. See also *Regina* v. *Wardell*, 3 F. & F. 82.

I am of the opinion that the evidence shews a case in which there would be clear ground for committing the accused for trial in Canada, if the offence were here committed, and the questions of law arising on the evidence would be determined on the facts found by the jury.

I am not willing, except on the express decision of some Court which I am bound to obey, to hold that it is necessary to give proof that by the law of the place where the alleged offence was committed the accused would be liable to the charge of forgery. I do not consider that there is any evidence before us that there is no such crime as forgery in the State of Illinois. There is a professional gentleman's opinion that on the facts in evidence the accused was not guilty of forgery. The accused was charged with uttering and passing as genuine a certain false and forged bank cheque, with intent to defraud, and a warrant issued on that charge, and formal application for his extradition is made.

I see nothing whatever before us to warrant any belief that forgery is not a crime under the foreign law. I read the evidence of the professional witness merely as his opinion on the effect of the evidence.

According as the facts are found on the trial, the law applicable thereto will be laid down by the Court. It is then that the result of the facts given in evidence will decide the guilt or innocence of the accused, and the opinion given by the professional witness is simply his opinion.

The high contracting parties treat such crimes as murder, forgery, rape, larceny, etc., as crimes well known to both, and, especially as between nations using the same language and laws based on generally similar principles, I cannot think it reasonable to insist on proof that the named crime exists in the demanding nation. We see evidence that the charge of forgery is made against the prisoner, and it seems to me, with much respect towards those who differ from me, that we are throwing an unlooked for difficulty in the way of a fair construction and execution of the treaty and of our own statute law based thereon.

BURTON, J.A.—

If sections 421, 422 and 424 of the Criminal Code of 1892, had created the crime charged in this case as a new offence, I should have had no hesitation in holding that no case had been made out for extraditing the prisoner, but the definition of a false document given in the Code makes no change in the law but merely defines in statutory form what had by judicial construction in the Courts of our own country been held to constitute a false document, the making of which with the knowledge and intent mentioned in the statute is declared to be forgery, and the uttering of which with like knowledge by one who uses, deals with, or acts upon it as if it were genuine, is made an indictable offence punishable in like manner as forgery.

The object of the treaty, as it seems to me, was to establish a reciprocal right on certain terms to demand the surrender of certain fugitives from justice and to impose a

corresponding obligation to deliver such fugitives who, having committed certain specified offences within the jurisdiction of our country, have fled from justice and taken refuge within that of another: see Spear on Extradition, p. 39. What object then is attained by shewing that the offence charged would be an extraditable crime according to our law unless it is also shewn that it would be such a crime according to the law of the country in which the alleged offence was committed?

Although it may be perfectly clear that the offence charged is forgery according to our law, that in itself would not, in my opinion, justify an order for extradition unless it be made to appear to the tribunal dealing with the matter that it is also an offence according to the law of the country where it is alleged to have been committed.

I agree that the evidence is sufficient to warrant a committal, if upon the whole case according to the law of this country it would justify the committal of the party for trial if the offence had been committed here. But what is the fact to be established? It is that an extraditable crime has been committed in the State of Illinois. The same description of evidence as would be sufficient to put the party upon his trial here would suffice, but it is, to my mind, clearly no evidence that an extraditable crime has been committed in Illinois because, if the crime had been committed here, it would have amounted to forgery or the uttering of a forged instrument.

It is quite true that under the terms of the treaty, although the offence charged might be indictable as forgery or the uttering of forged paper in Illinois, that would in itself furnish no ground for extradition unless it also constituted a crime by our law; but the foundation of the whole charge is that it amounts to the crime of uttering forged paper in Illinois.

In a recent case in England, *In re Bellencontre*, (1891) 2 Q.B. 122, Cave, and Wills, JJ. held that in order to justify extradition it was necessary to establish that the accused person was accused of a crime in the country where the

alleged offence was committed, which was a crime by English law, and that there should be a *prima facie* case made out that he was guilty of a crime under the foreign law, and also of a crime under English law. If those conditions are satisfied, and not otherwise, the extradition ought to be granted. This has always been my view of the law.

The late Chief Justice Dorion, for whose opinions I always entertain a very great respect, expressed a contrary view in *Re Worms*, 22 L.C. Jurist 109. He was dealing in that case with an ordinary case of forging another person's name—pure and simple—a case which would be forgery by the laws of all civilized countries, and does not appear to have had present to his mind (I say so with all deference) the complicated cases in which either by statute or judicial interpretation offences have been declared to be forgery in a particular locality.

Take this case for instance :—If the State of Illinois had declared that such a state of facts as existed in *Rex* v. *Peacock*, R. & R. 278, constituted the crime of forgery, and the Courts in England and in this country had held that they constituted only the offence of obtaining money by false pretences, is it not clear that although the accused might be tried in Illinois for forgery he could not be surrendered, it not being forgery by the law of this country? I might multiply instances. If, on the contrary, although the facts in *Rex* v. *Peacock*, R. & R. 278, would compel us in a precisely similar case, to hold the party guilty of forgery if tried here, it would not necessarily be held to be forgery in Illinois, the result necessarily being that the prosecution there must fail. We are, perhaps, in these cases inclined to allow ourselves to be influenced by the facts in the particular case, but it must not be overlooked that we are laying down a rule for all cases, and it seems somewhat inconsistent with one's ideas of justice that a person should be carried to a foreign country, it may be thousands of miles away, and put to the annoyance and expense of a trial, and, it may be, left penniless there, away from his home, when a disclosure of the facts would have shewn it was not a case for extradition.

But this case differs, in my opinion, from *Rex* v. *Peacock*, R. & R. 278. That case is, perhaps, explainable on the ground that White was representing himself as the person proposed as curate, and who had a living in Dublin, and it was to that individual, therefore, to whom the credit was given, and not to the person who professed to personate him. Here the person signing the cheque did not profess to be any one but Robert Osborne, and to him in that name, and to no one else, was the credit given.

One of the highest authorities upon the criminal law in recent years, the late Sir James Fitz James Stephen, in his admirable Digest of the Criminal Law, says (5th ed., p. 324) that it is forgery to make a document in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing, but he goes on to qualify that definition, and to hold that it is not making a false document "to sign a document in the name of a person personated by the person who signs it, or in a fictitious name, provided that the effect of the instrument does not depend upon the maker's identity with the person personated, or the correctness of the name assumed by him." And he gives an illustration which corresponds exactly with this case if we leave out of view that the parties may from the first have contemplated the fraud which they ultimately carried out, which to my mind is a very different thing from forgery. His illustration is this :

"A. personating B., draws a cheque in his assumed name of B., on a bank with which in his assumed name he had opened a genuine account by the actual payment of money to his credit. A. does not make a false document."

"Such," he says, "I submit would be the law, though I know of no case in which the precise question has been determined ;" but he points out that if the law were otherwise, a person passing by a false name would go half way to forgery every time he signed it. "If a man passing by a false name drew many bills and regularly provided for them, and at last drew one for which he could not and ought to have known that he could not provide, I do not think," he

says, "he would be guilty of forgery any more than if he had used his own name. The use of a false name is no doubt a fact from which an intent to defraud may often be inferred, but which is a different matter," and then he refers to *Regina* v. *Martin*, 5 Q.B.D. 34, which he thinks confirms his view.

In the case of *Regina* v. *Dunn*, 1 Leach C.C. 59, in which the prisoner was held guilty of forgery—Aston, J., dissenting—the Judges in giving judgment agreed that in all forgeries the instrument supposed to be forged must be a false instrument in itself, and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being given wholly to himself without any regard to the name or any relation to a third person. Although nine Judges held in that case that the crime amounted to forgery, in deference to Mr. Justice Aston's opinion the sentence was commuted.

Here the banks all knew that the person opening the account and drawing the cheques professed to be the person named; to him alone was the credit given, he and he alone would have been the party liable upon the cheque in the event of its dishonour; and it is not pretended that any third person of the name of Osborne was intended.

I can understand a person representing himself to be a member of a leading banking firm depositing money with a bank, and drawing cheques from time to time, and eventually drawing one for which there were no funds; although the banker knew that that person signed the cheque he would have been influenced in taking it by the belief that the person signing it was the person he represented himself to be, a member of a responsible banking firm; and that he would be guilty of forgery.

Here the person signing the cheque was known to the bank on which it was drawn as Robert Osborne, the credit was given to him as Robert Osborne, not to some other person of that name, and his subscribing it in that name cannot make it forgery. On the ground, therefore, that there was no evidence to shew that such a transaction was forgery

by the law of Illinois, and even if so, it is not so here, although a case of gross and deliberate fraud, I am of the opinion that the case is not made out.

Whilst I fully agree with the late Chief Justice of this Court, that it is in the interest of both countries that neither should be made the asylum for forgers, cheats and embezzlers, and that as few impediments as possible should be allowed to exist to their being returned to the country against whose laws they are offenders, I also fully concur in his view that it is incumbent upon us to see that the act charged clearly constitutes an extradition offence, and, unless it is established as a matter of law that it is so, the accused ought not to be surrendered.

OSLER, J.A.—

I am of the same opinion. There is no evidence whatever of any fraudulent intent in the use of the particular cheque in question, and that fraudulent intent must be shewn. If the prisoner was guilty of forgery in using this cheque, then he was also guilty of forgery in using the previous cheques, though they were paid in due course.

Then, I think also that the prosecutors must shew that the prisoner has been guilty of forgery according to the law of Illinois, but they have not done this, and the mere fact that surrender has been demanded is not enough. Clearly the offence in question is not forgery in some of the States: see *Commonwealth* v. *Baldwin*, 11 Gray (Mass.) 197, and the onus is on the prosecutors to shew that by the law of Illinois it is.

MACLENNAN, J.A.—

I am of opinion that this appeal should be dismissed.

I think the evidence, which I have read very carefully since the argument, is such that from it a Court and jury might properly come to the conclusion that the false names

assumed by Frederick Murphy were so assumed by arrangement between himself and his brother the prisoner, in order by false cheques to defraud some one of the several banks in which they had opened accounts in those false names. If so, I think the authorities shew that the cheque was a forgery.

I agree entirely in the judgment of the Chief Justice just read, and also in that of the learned Chief Justice of the Common Pleas Division.

The Court being equally divided, appeal dismissed with costs.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE AND MEAGHER, JJ., GRAHAM, E.J., AND HENRY, J.

THE QUEEN v. DIXON.

Threatening letter—Accusing of offence with intent to extort—'Offence' meaning of—Infraction of provincial law included—Cr. Code 406.

1. The "offence" to accuse, or threaten to accuse, a person whereof with intent to extort or gain anything from him is made an indictable offence by Cr. Code, sec. 406, need not be an offence under the Code or other Dominion law, but may be an offence under a provincial law.

ARGUED: November 12, 1895.

DECIDED: November 12, 1895.

Information was laid before the stipendiary magistrate for the City of Halifax, that Richard S. Dixon, on or about the 21st day of August, 1895, unlawfully did send to one Malcolm McDonald, the informant, by the name and description ot Mr. McDonald, a letter threatening to accuse him, the said Malcolm McDonald, of selling liquor after hours, contrary to the provisions of the "Liquor License Act, 1895," with a view and intent thereby to extort and gain money from the said Malcolm McDonald, he, the said Richard S. Dixon, then well knowing the contents of the said letter.

Section 406 of the Criminal Code enacts that :—

Every one is guilty of an indictable offence, and liable to imprisonment for seven years who—

(*a.*) with intent to extort or gain anything from any person accuses or threatens to accuse either that person or any other person of any offence other than those specified in the last section, whether the person accused or threatened with accusation is guilty or not of that offence ; or

(*b.*) with such intent as aforesaid, threatens that any person shall be so accused by any person ; or

(*c.*) causes any person to receive a document containing such accusation or threat knowing the contents thereof ; or

(*d.*) by any of the means aforesaid, compels or attempts to compel any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into, or used or dealt with as, a valuable security.

HALIFAX, November 12, 1895.

H. McInnes, moved for a writ of prohibition to prevent the stipendiary magistrate from trying the information.—The word "offence" means offence under the Code. A violation of the Liquor License Act is not an offence known to the Code. (HENRY, J.—Must you not show that there is something in the Code to exclude the idea of criminality outside the offences specifically mentioned ?)

A. McKay, contra.—The word "offence" has been used as applicable peculiarly to violations of provincial laws. The gravamen of the charge is making a threat as a means of extorting money ; Tashereau, Cr. Code 455. Section 406 of the Code is new, and was intended to cover offences not included in the preceding section.

There is a distinction between offences and indictable offences. In section 872 of the Code the word offence is used to cover a violation of a local statute ; see also sections 93 to 96, 105 to 113, and 117 to 119 ; *Queen* v. *Shepheard*, 20

N.S.R., 476; *Queen* v. *Calhoun*, 20 N.S.R. 395. (HENRY, J. —Under sec 92, sub-sec. 15, the local legislature can fine and imprison. MEAGHER, J.—The word "indictable" was probably left out to meet just that class of cases.) As to construction; Hardcastle on Statutory Law, 198.

H. McInnes in reply.

RITCHIE, J.—

The Court are of opinion that the word "offence" as used in section 406 of the Criminal Code, applies to offences against local as well as against Dominion Acts, and is not confined to offences against the Code. The motion will therefore be dismissed.

Writ of prohibition refused.

[COURT QF QUEEN'S BENCH, QUEBEC.]

BEFORE OUIMET, J.

Ex Parte CORRIGAN.

Habeas Corpus—Commitment—Identity of accused—Objection to wrong name—Time for stating—Amendment before plea—Alias name.

1. A person who is charged under a wrong name, and who pleads without objection to same, is not entitled after conviction to be released under a writ of habeas corpus on the ground that she is not the person against whom the commitment was issued.

2. The proper time to take objection to a wrong name under which an accused is charged is before pleading to the charge, at which time the mistake may be corrected by an amendment.

MONTREAL, August 30, 1899.

OUIMET, J.—

The petitioner, Bridget Corrigan, is brought before me on a writ of habeas corpus. She claims that she is unlawfully

detained in jail on the authority of a commitment issued against one Kate Wilson, of the City of Montreal, while she is Bridget Corrigan, wife of Godfrey Filiatrault, of the same place. Kate Wilson was convicted of selling liquor without a license, fined and committed to jail on default of payment.

From the affidavits and other documents filed before me, I find that the main allegation of her petition is true and that her real name is Bridget Corrigan. I also find that before being arrested she was known and kept house by herself under the name of Kate Wilson. She was arrested under that name. When called upon to plead she entered a plea of not guilty; she was tried and convicted under the same name without ever protesting that it was not her name.

It is conclusively established that the petitioner and Kate Wilson are one and the same person. It is now too late for her to complain of a mistake, which, if availed of in the proper time, i.e., before pleading, could have been remedied at once. The writ of habeas corpus is therefore set aside.

Petition refused.

L. H. Demers, for petitioner.
J. A. Drouin, for the Crown.

APPENDIX.

CRIMINAL LAW AMENDMENTS.

1897 to 1899 inclusive.

THE CUSTOMS TARIFF, 1897.

(Statutes of Canada, 60-61 Vict., chapter 16.)

14. Blank invoice with certificate of correctness. — Any person who, without lawful excuse, the proof of which shall be on the person accused, sends or brings into Canada, or who, being in Canada, has in his possession, any bill-heading or other paper appearing to be a heading or blank capable of being filled up and used as an invoice, and bearing any certificate purporting to show, or which may be used to show, that the invoice which may be made from such bill-heading or blank is correct or authentic, is guilty of an indictable offence and liable to a penalty of five hundred dollars, and to imprisonment for a term not exceeding twelve months, in the discretion of the court, and the goods entered under any invoice made from any such bill-heading or blank shall be forfeited.

THE INLAND REVENUE ACT.

By the Statutes of Canada 1897 (60-61 Vict., chapter 19) subsection 4 of sec. 113 of *The Inland Revenue Act*, R.S.C. 1886, c. 34, as amended 1889, c. 15, s. 2, is repealed, and the following subsection is substituted therefor :—

113 (4). Limitation of time for prosecution.—Any information or complaint with respect to any offence against the provisions of this Act or any other law relating to the inland

revenue, may, whenever the prosecution, suit or proceeding is instituted under the *Act respecting summary proceedings before Justices of the Peace*, be laid or made within two years of the time when the matter of the information or complaint arose.

Section 159 of *the Inland Revenue Act*, R.S.C. 1886, c. 34, is amended to read as follows (1897, c. 19, s. 6, and 1898, c. 27, s. 3):—

159. Penalty for distilling without a license.—Every person who, without having a license under this Act, then in force—

(*a.*) Distils or rectifies any spirits, or makes or ferments any beer, or—

(*b.*) Assists in distilling or rectifying any spirits, or in making or fermenting any beer or wash in any unlicensed place, or—

(*c.*) Imports, makes, commences to make, sells, offers for sale or delivers any still, worm, rectifying or other apparatus suitable for the manufacture of wash, beer or spirits, or for the rectification of spirits, or any part of such apparatus, or—

(*d.*) Completely or partially sets up or assists in setting up, prepares or partially prepares for working, any such still, worm, rectifying or other apparatus, or—

(*e.*) has in his possession, in any place, any such still, worm, rectifying or other apparatus or any part or parts thereof, or any beer or wash suitable for the manufacture of spirits, without having given notice thereof as required by this Act, except in case of registration provided for by section 125 of this Act, or in whose place or upon whose premises such things are found; or

(*f.*) conceals or keeps, or allows or suffers to be concealed or kept, in any place or premises owned or controlled by him, any such still, worm, rectifying or other apparatus, or part thereof, or any beer or wash suitable for the manufacture of spirits; or

(*g.*) conceals by removing, or removes, or assists in concealing by removing or otherwise, any such still, worm, rectifying or other apparatus, or part thereof, or any beer or wash suitable for the manufacture of spirits—

Is guilty of a misdemeanor and shall, for a first offence, be liable to a penalty not exceeding five hundred dollars, and not less than one hundred dollars, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months, and for every subsequent offence, to a penalty of five hundred dollars, and to imprisonment, with hard labour, for a term not exceeding twelve months and not less than six months, and, in default of payment of the penalty, to a further term of imprisonment equal to that already imposed by the court for such subsequent offence; and—

All such stills, worms, fermenting-tuns, rectifying or other apparatus suitable for the manufacture of wash, beer or spirits, or for the rectification of spirits, or parts thereof, and all beer, wash or spirits that are found in the possession of any unlicensed person, or in any unlicensed place, shall be forfeited to the Crown, and shall be seized by any officer of Inland Revenue, and may either be destroyed when and where found or removed to some place of safe keeping, in the discretion of the seizing officer.

The subsection substituted for subsection 1 of section 162 by the statutes of 1894, c. 35, s. 3, is repealed and the following substituted therefor (1897, c. 19, s. 7):—

162. Penalty for sale of spirits unlawfully manufactured.—Every person who sells or offers for sale, or who purchases any spirits, or has any spirits in his possession, knowing them to have been unlawfully manufactured or imported, shall, for a first offence, incur a penalty not exceeding fifty dollars and not less than ten dollars, and for each subsequent offence, a penalty of one hundred dollars; and all spirits so

unlawfully manufactured or imported, wherever they are found, and all horses and vehicles and other appliances which have been or are being used for the purpose of removing the same, shall be forfeited to the Crown, and shall be dealt with accordingly.

Section 183 is repealed and the following substituted therefor (1897, c. 19, s. 9):—

183. Brewing without license.—Every person who, without having a license under this Act then in force, brews any beer or other fermented liquor, except for the use of himself or his family, as by this Act provided, is guilty of a misdemeanour, and shall, for the first offence, incur a penalty of fifty dollars, and for each subsequent offence, a penalty of two hundred dollars.

Section 317 is amended to read as follows (1897, c. 19, s. 19):—

317. Illegal manufacture of tobacco.—Every person who, without having a license under this Act, then in force,—

(*a.*) Manufactures any tobacco or cigars, except as by this Act permitted, or—

(*b.*) Manufactures, except by himself or the members of his family resident with him on the farm or premises whereon it is grown, any tobacco grown by himself for his private use in excess of the quantity allowed, or other than of the description specified, by subsection two of section three hundred and three of this Act, or —

(*c.*) Claiming to have grown any tobacco and manufactured it solely for his own use, sells or barters away any tobacco so manufactured, or—

(*d.*) Having purchased any raw leaf tobacco grown in Canada from the cultivator thereof, in any way unlawfully manufactures such tobacco and sells it, or offers it for sale in a manufactured state,—

Is guilty of a misdemeanor, and shall, for the first offence, incur a penalty not exceeding one hundred dollars, and not

less than twenty-five dollars, and for each subsequent offence, a penalty of five hundred dollars, and all goods subject to excise found on the premises wherein any such offence is committed, shall be forfeited to the Crown, and shall be seized by any officer of Inland Revenue and dealt with accordingly.

Section 334 is amended to read as follows (1897, c. 19, s. 20):—

334. Except as herein specially provided, every person who sells or offers for sale, or, not being a licensed tobacco or cigar manufacturer, has in his possession any kind of manufactured tobacco or cigars not put up in packages and stamped in accordance with the provisions of this Act, is guilty of a misdemeanor and shall incur a penalty not exceeding five hundred dollars and not less than fifty dollars; and any tobacco or cigars so found which are not put up in packages and stamped as herein provided, shall be forfeited to the Crown, and shall be seized by any officer of Inland Revenue and dealt with accordingly.

THE DAIRY ACT, 1897.

(Statutes of Canada 60-61 Vict., chapter 21).

4. Branding of butter and cheese.—No person shall sell, offer, expose, or have in his possession for sale, any butter or cheese made in Canada, and destined for export therefrom, unless the word "Canadian," "Canadien," or "Canada" is printed, stamped or marked in a legible and indelible manner, in letters not less than three-eights of an inch high, and one-quarter of an inch wide, upon—

(*a*) the box or package containing the butter or cheese, and—

(*b*) moreover, in the case of cheese, upon the cheese itself, before it is taken from the factory where it was made.

5. Defacing marks prohibited.—No person, with intent to misrepresent, shall remove or in any way efface, obliterate or alter the word "Canadian," "Canadien," or "Canada," or the registration number on any cheese, or on any box or package which contains cheese or butter.

6. Misrepresentation as to dates of manufacture.—No person shall knowingly sell, or offer, expose, or have in his possession for sale, any cheese or butter upon which, or upon any box or package containing which, is printed, stamped or marked any month other than the month in which such butter or cheese was made; and no person shall, knowingly and with intent to misrepresent, sell, or offer, expose, or have in his possession for sale, any cheese or butter represented in any manner as having been made in any month other than the month in which it was actually made.

7. Penalties.—Every person, who, by himself, or by any other person to his knowledge, violates any of the provisions of section four, five or six of this Act shall, for each offence, upon summary conviction, be liable to a fine not exceeding twenty dollars and not less than five dollars, for every cheese or box, or package of butter or cheese which is sold, or offered, exposed, or had in his possession for sale, contrary to the provisions of those sections, together with the costs of prosecution, and, in default of payment of such fine and costs, shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months, unless such fine and the costs of enforcing it are sooner paid.

8. Application of penalties. — Any pecuniary penalty imposed under this Act shall, when recovered, be payable, one half to the informant or complainant, and the other half to Her Majesty.

THE ADULTERATION ACT.

Section 22 of *The Adulteration Act*, R.S.C. 1886, c. 107, is repealed and the following substituted therefor (1898, c. 24, s. 4):—

22. Penalty for adulteration of food or drug.—Every person who wilfully adulterates any article of food or any drug, or orders any other person so to do, shall,—

(*a.*) if such adulteration is, within the meaning of this Act, deemed to be injurious to health, for the first offence, incur a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than fifty dollars and costs, and for each subsequent offence a penalty not exceeding one thousand dollars and costs, or one year's imprisonment, or both, and not less than one hundred dollars and costs;

(*b.*) if such adulteration is, within the meaning of this Act, deemed not to be injurious to health, incur a penalty not exceeding two hundred dollars and costs, or three months' imprisonment, and for each subsequent offence a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than one hundred dollars and costs.

Section 23, as amended by section 9 of chapter 26 of the statutes of 1890, is repealed and the following is substituted therefor (1898, c. 24, s. 5):—

23. Penalty for selling adulterated article.—Every person who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug, which is adulterated within the meaning of this Act, shall,—

(*a.*) if such adulteration is, within the meaning of this Act, deemed to be injurious to health, for a first offence incur a penalty not exceeding two hundred dollars and costs, or three months' imprisonment, or both, and for each subsequent offence a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than fifty dollars and costs;

(*b.*) if such adulteration is, within the meaning of this Act, deemed not to be injurious to health, incur for each such offence a penalty not exceeding one hundred dollars and costs, and not less than five dollars and costs.

2. Provided that if the person accused proves to the court before which the case is tried that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the purchaser or inspector, and with a written warranty to that effect,—which warranty, in the form of the third schedule to this Act, is produced at the trial of the case,—and that he sold it in the same state as when he purchased it, and that he could not with reasonable diligence have obtained knowledge of its adulteration, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence, and has called the party from whom he purchased the said article into the case, as provided for by the next following subsection of this section, in which case he shall be liable only to the forfeiture provided by section 21 of this Act.

3. The person presenting the defence referred to in the next preceding subsection shall, upon his sworn declaration that he purchased the article in good faith, and as provided for in the said subsection, obtain a summons to call such third party into the case; and the court shall at the same time hear all the parties, and decide upon the entire merits of the case, not only as regards the person originally accused, but also as regards the third party so brought into the case.

Section 28 is amended to read as follows (1890, c. 26, s. 11, and 1898, c. 24, s. 8):—

28. Costs.—Any expenses incurred in procuring and analyzing any food, drug or agricultural fertilizer, in pursuance of this Act, shall, if the person from whom the sample is taken is convicted of having in his possession, selling, offering or exposing for sale, adulterated food, drugs or agricultural fertilizers, in violation of this Act, be deemed a portion of the costs of the proceedings against him, and shall be paid by him accordingly; and in all other cases such expenses shall be paid as part of the expenses of the officer, or by the person who procured the sample, as the case may be.

2. Such expenses of prosecution shall also include a reasonable counsel fee, in the discretion of the judge; and in the case of a private prosecutor, if the prosecution is dismissed as being instituted without reasonable and probable cause, the costs of defence shall be taxed against such prosecutor.

The following section is added to the Act (1898, c. 24, s. 9):—

31. Other remedies not affected.—Nothing in this Act contained shall affect the power of proceeding by indictment or take away any other remedy against any offender under this Act.

The following schedule is added to the Act (1898, c. 24, s. 10; and see section 23, subsection 2, *supra*):—

THIRD SCHEDULE.

Form of Warranty.

I hereby warrant that the undermentioned articles manufactured by myself or by persons known to me and sold by me to on the dates opposite thereto, are pure and unadulterated within the meaning of the Adulteration Act.

Date.	Article.

(*Signature of manufacturer or vendor.*)

THE CANADA EVIDENCE ACT.

Section 5 of the *Canada Evidence Act*, 1893, is repealed and the following substituted therefor (1898, c. 53, s. 1):—

5. Incriminating answers.—No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

THE CRIMINALS' IDENTIFICATION ACT, 1898.

1. Systems for identifying criminals authorized.—Any person in lawful custody, charged with, or under conviction of an indictable offence, may be subjected, by or under the direction of those in whose custody he is, to the measurements, processes and operations practiced under the system for the identification of criminals commonly known as the Bertillon Signaletic System, or to any measurements, processes or operations sanctioned by the Governor in Council having the like object in view. Such force may be used as is necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law.

2. Non-liability of persons concerned in operation.—No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication shall incur any liability, civil or criminal, for any-

thing lawfully done under the provisions of section 1 of this Act.

3. Short title.—This Act may be cited as *The Criminals' Identification Act, Canada*, 1898.

ACT RESPECTING THE PROTECTION OF NAVIGABLE WATERS.

7. Throwing of stone, etc., into navigable waters.—The first subsection of section 7 of the *Act respecting the Protection of Navigable Waters*, R.S.C. 1886, c. 91, s. 7, as amended 1898, c. 41, s. 1 (the latter section being repealed by this amendment) is amended by adding thereto the following paragraphs (1899, c. 31, s. 1) :—

(*a.*) No person shall throw or deposit or cause or permit to be thrown or deposited, any stone, gravel, earth, cinders, ashes or other material or rubbish liable to sink to the bottom in any navigable tidal waters of Canada where there are not at least 12 fathoms of water at extreme low tide;

(*b.*) No person shall throw or deposit or cause or permit to be thrown or deposited any stone, gravel, earth, cinders, ashes or other material or rubbish liable to sink to the bottom in any navigable non-tidal waters of Canada where there are not at all times at least eight fathoms of water ;

(*c.*) Every person who violates the provision of either of the two next preceding paragraphs shall, on summary conviction, be liable to a penalty not exceeding three hundred dollars and not less than twenty dollars, and in any case where any of such materials are thrown from a vessel and a conviction is obtained therefor, such vessel shall be liable for the penalty and may be detained by any port warden or collector of customs until it is paid ;

(*d.*) Nothing in this subsection contained shall affect the legal powers, rights or duties of harbour commissioners, harbour masters or port wardens ;

(*e.*) The Minister of Marine and Fisheries may appoint places in any navigable water not within the jurisdiction of

any of the officers mentioned in the next preceding paragraph where stone, gravel, earth, cinders, ashes or other material may be deposited notwithstanding that the minimum depth of water at any such place may be less than twelve or eight fathoms in the case of tidal or non-tidal waters respectively; and may make rules regulating the depositing of such materials;

Provided always, that before any proceedings are taken for the recovery of the penalty for violation of any of the provisions of this subsection with respect to non-tidal waters, the approval of the Minister of Marine and Fisheries shall first be obtained.

THE RAILWAY ACT.

273. Offences—Subsections 2 and 3 of section 273 of *The Railway Act*, Statutes of Canada, 1888, c. 29, are repealed, and the following subsections are substituted therefor (1899, c. 37, s. 4):—

"2. Every person who wilfully breaks down, injures, weakens or destroys any gate, fence, erection, building or structure of a company, or removes, obliterates, defaces or destroys any printed or written notice, direction, order, by-law or regulation of a company, or any section of or extract from this Act or any other Act of Parliament, which a company or any of its officers or agents have caused to be posted, attached or affixed to or upon any fence, post, gate, building or erection of the company, or any car upon any railway, shall be liable on summary conviction to a penalty not exceeding fifty dollars, or, in default of payment, to imprisonment for a term not exceeding two months.

"3. Every person who enters upon any railway train without the knowledge or consent of an officer or servant of the company with intent fraudulently to be carried upon the said railway without paying fare thereon, or who wilfully obstructs or impedes any officer or agent of the company in the execution of his duty upon any train, railway, or upon

any of the premises of the company, or who, not being an employee of the company, wilfully trespasses by entering upon any of the stations, cars or buildings of the company in order to occupy the same for his own purposes, shall be liable to the like penalty or imprisonment, and shall be liable to be proceeded against and dealt with in like manner, as mentioned in subsection 2 of this section in regard to the offences therein mentioned.

"4. Any person charged with an offence under this section shall be a competent witness on his own behalf."

THE CRIMINAL CODE, 1892.

Section 520 is amended to read as follows (1899, c. 46, s. 1):—

520. Combinations in restraint of trade.—Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and, if a corporation, is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully—

(*a.*) to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b.*) to restrain or injure trade or commerce in relation to any such article or commodity; or

(*c.*) to prevent, limit, or lessen the manufacture or production of any such article or commodity, or to enhance the price thereof; or

(*d.*) to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

ACT TO PROVIDE FOR THE CONDITIONAL LIBERATION OF PENITENTIARY CONVICTS.

(STATUTES OF CANADA 1899, CHAPTER 49).

1. License to be at large.—It shall be lawful for the Governor General by an order in writing under the hand and seal of the Secretary of State to grant to any convict under sentence of imprisonment in a penitentiary a license to be at large in Canada, or in such part thereof as in such license shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit; and the Governor General may from time to time revoke or alter such license by a like order in writing.

2. Effect of License.—So long as such license continues in force and unrevoked such convict shall not be liable to be imprisoned by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such license.

3. Effect of revocation and proceedings thereon.—If any such license is revoked it shall be lawful for the Governor General by warrant under the hand and seal of the Secretary of State to signify to the Commissioner of Dominion Police at Ottawa that such license has been revoked, and to require the said commissioner to issue his warrant under his hand and seal for the apprehension of the convict to whom such license was granted, and the said commissioner shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same is given for that purpose in any part of Canada, and shall have the same force and effect in all parts of Canada as if the same had been originally issued or subsequently endorsed by a justice or other lawful authority having jurisdiction in the place where the same is executed, and such convict, when apprehended under such warrant, shall be brought as soon as conveniently may be before a justice of the peace of the county in which the same is executed, and such justice shall

thereupon make out his warrant under his hand and seal for the recommitment of such convict to the penitentiary from which he was released by virtue of the said license, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his original sentence, and shall undergo the residue thereof as if such license had been not granted.

Provided that if the place where such convict is apprehended is not within the province territory or district for which such penitentiary is the pentitentiary, such convict shall be committed to the penitentiary for the province, territory or district within which he is so apprehended and shall there undergo the residue of his sentence.

4. Form of license.—A license under section 1 may be in the form A in the schedule to this Act, or to the like effect, or may, if the Governor General thinks proper, be in any other form different from that given in the schedule which he may think it expedient to adopt, and contain other and different conditions.

2. A copy of any conditions annexed to any such license, other than the conditions contained in form A, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then in session, or if not, then within fourteen days after the commencement of the next session of Parliament.

5. Conviction to forfeit license.—If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited.

6. Holder of license to notify his address and all changes thereof.—Every holder of such a license who is at large in Canada shall notify the place of his residence to the chief officer of police or the sheriff of the city, town, county or district in which he resides, and shall, whenever he changes such residence within the same city, town, county or district, notify such change to the said chief officer of police or sheriff, and whenever he is about to leave a city, town, county or district he shall notify such his intention to the chief officer of

police or sheriff of that city, town, county or district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at that place, and whenever he arrives in any city, town, county or district he shall forthwith notify his place of residence to the chief officer of police or the sheriff of such last-mentioned city, town, county or district.

2. Every male holder of such a license shall, once in each month, report himself at such time as may be prescribed by the chief officer of police or sheriff of the city, town, county or district in which such holder may be, either to such chief officer or sheriff himself, or to such other person as he may direct, and such report may according as such chief officer or sheriff directs be required to be made personally or by letter.

3. If any person to whom this section applies fails to comply with any of the requirements of this section, he shall in any such case be guilty of an offence against this Act, unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that, otherwise, he did his best to act in conformity with the law; and on summary conviction of such offence he shall be liable in the discretion of the justice either to forfeit his license or to imprisonment with or without hard labour for a term not exceeding one year.

4. The Governor General may, by order under the hand of the Secretary of State, remit any of the requirements of this section either generally or in the case of any particular holder of a license.

7. Offences with respect to license.—Any holder of a license under this Act who—

(*a.*) fails to produce the same whenever required so to do by any judge, police or other magistrate or justice of the peace before whom he may be brought charged with any offence or by any peace officer in whose custody he may be, and fails to make any reasonable excuse for not producing the same; or

(*b.*) breaks any of the other conditions of his license by an act which is not of itself punishable either upon indictment or upon summary conviction is guilty of an offence, upon summary conviction of which he shall be liable to imprisonment for three months with or without hard labour.

8. Arrest without warrant in certain cases.—Any peace officer may take into custody without warrant any convict who is the holder of such a license,

(*a.*) whom he reasonably suspects of having committed any offence, or

(*b.*) if it appears to such peace officer that such convict is getting his livelihood by dishonest means;

and may take him before a justice to be dealt with according to law.

2. If it appears from the facts proved before the justice that there are reasonable grounds for believing that the convict so brought before him is getting his livelihood by dishonest means such convict shall be deemed guilty of an offence against this Act, and his license shall be forfeited.

3. Any convict so brought before a justice of the peace may be convicted of getting his livelihood by dishonest means although he has been brought before the justice on some other charge, or not in the manner provided for in this section.

9. Certificate of Conviction.—When any holder of a license under this Act is convicted of an offence punishable on summary conviction under this or any other Act the justice or justices convicting the prisoner shall forthwith forward by post a certificate in the form B in the schedule to this Act to the Secretary of State, and thereupon the license of the said holder may be revoked in manner aforesaid.

10. Conviction and sentence to remain in force.—The conviction and sentence of any convict to whom a license is granted under this Act shall be deemed to continue in force while such license remains unforfeited and unrevoked, although execution thereof is suspended.

11. Further imprisonment when license forfeited.—When any such license as aforesaid is forfeited by a conviction of an indictable offence or other conviction, or is revoked in pursuance of a summary conviction or otherwise, the person whose license is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his license is forfeited or revoked, further undergo a term of imprisonment equal to the portion of the term to which he was sentenced that remained unexpired at the time his license was granted, and shall for the purpose of undergoing such last mentioned punishment be removed from the jail or other place of confinement in which he is, if it be not a penitentiary, to a penitentiary by warrant under the hand and seal of any justice having jurisdiction at the place where he is confined; and if he is confined in a penitentiary shall undergo such term of imprisonment in that penitentiary, and in every case such convict shall be liable to be dealt with in all respects as if such term of imprisonment had formed part of his original sentence.

12. Administration of statute.—It shall be the duty of the Minister of Justice to advise the Governor General upon all matters connected with or affecting the administration of this Act.

SCHEDULE.

Form A.

LICENSE.

OTTAWA,.....day of.....18....

His Excellency the Governor General is graciously pleased to grant to....., who was convicted of .....at the.....for the.....on the....., and was then and there sentenced to imprisonment in the.....penitentiary for the term of....., and is now confined in the ....., license to be at large from the day of his liberation under this order during the remaining portion of his term of imprisonment, unless the said..... .....shall before the expiration of the said term be convicted of an indictable offence within Canada, or shall be summarily convicted of an offence involving forfeiture, in which case such license will be immediately forfeited by law, or unless it shall please His Excellency sooner to revoke or alter such license.

This license is given subject to the conditions endorsed upon the same upon the breach of any of which it will be liable to be revoked whether such breach is followed by a conviction or not.

And His Excellency hereby orders that the said..... ..... be set at liberty within thirty days from the date of this order.

Given under my hand and seal at .....the..... day of.....18..... } *Secretary of State.*

CONDITIONS.

1. The holder shall preserve his license and produce it when called upon to do so by a magistrate or a peace officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

If his license is forfeited or revoked in consequence of a conviction for any offence he will be liable to undergo a term of imprisonment equal to the portion of his term of. ..... years which remained unexpired when his license was granted, viz. :—the term of.....years.

Form B.

FORM OF CERTIFICATE OF CONVICTION.

I do hereby certify that A. B., the holder of a license under the *Act to provide for the conditional liberation of Penitentiary Convicts* was on the .....day of.....in the year.....duly convicted by and before ..... of the offence of.....and sentenced to.....

.....

J.P., Co.....

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Accessory

Receiving stolen goods — Liability of accessory as principal.

If the accused were not an aider and abettor or a principal in the second degree in the commission of the theft, the circumstance that he was an accessory before the fact by counselling and procuring the commission of the theft, and therefore liable under sec. 61 of the Criminal Code to be convicted as a principal, does not prevent his conviction for the substantive offence of afterwards receiving the stolen property knowing it to have been stolen.

Such an accessory before the fact who afterwards becomes a receiver of the stolen property may be legally convicted both of the theft and of 'receiving.' R. v. HODGE, (MAN.) 350

Theft—Assisting to conceal stolen property.

A person who knowingly assists a thief to conceal stolen money which he is in the actual and proximate act of carrying away, by receiving the money for the purpose of concealing it, is guilty of aiding and abetting in the theft, and may under Cr. Code, sec. 61 (*c*), be convicted as a principal.

Although the theft may be complete by the mere taking and carrying away of stolen property, the subsequent carrying of same to a place of concealment by a person who did not participate in the taking, if done with a guilty knowledge and as a continuation of and proximately at the same time as the theft, is an 'aiding and abetting' of the same.

An act done which may enter into the offence, although the crime may be complete without it, may be considered as a continuation of the criminal transaction so as to make the participator an aider and abettor, although his participation occurs only after such acts have been done as in themselves would constitute the crime. R. v. CAMPBELL, (QUE.) 357

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R. v. QUINN, (ONT.) 153

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Cr. Code, sec. 880(e), enacting that the court "may" order the fine and costs to be paid out of moneys deposited pursuant to sec. 880(c) on taking an appeal, if the conviction is affirmed, is to be construed as giving the court no discretion to refuse the application of the party to be benefited by the making of the order. FENSON v. NEW WESTMINSTER, (B.C.) 52

Summary conviction—Appeal after plea of guilty—Re-opening case to revise punishment.

On an appeal from a summary conviction had upon a plea of guilty the case should not be re-opened and witnesses called as to the merits for the purpose of revising the punishment imposed, if the magistrate has not acted oppressively.

R. v. BOWMAN, (B.C.) 89

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Leave to appeal to Imperial Privy Council.

Leave to appeal to the Judicial Committee of the Privy Council upon a question of the constitutionality of a provincial statute will, except under special circumstances, be refused to the party convicted thereunder whose conviction has been affirmed in certiorari proceedings, if an appeal to the Privy Council is pending in a civil action between other parties in which the same question is being litigated. R. v. LITTLE, (B.C.) 240

Stated case—Offence under Ontario Statute.

The procedure by way of "stated case" under sec. 900 of the Criminal Code is a form of appeal, and as the application of the Criminal Code to offences under Ontario Statutes is declared by the Ontario Summary Convictions Act (R.S.O. 1897, c. 90, s. 2) not to affect 'procedure on appeals,' there is no jurisdiction to proceed by 'stated case' to review a decision of a magistrate in respect of such an offence, except where the constitutionality of Provincial Acts are involved. (R.S.O. 1897, c. 91.)

The appeal whether of the prosecutor or of the accused is, as regards such offences, to the Court of General Sessions under the provision of the Ontario Summary Convictions Act.

R. v. ROBERT SIMPSON COMPANY, LIMITED, (ONT.) 272

From summary conviction—Offence under provincial statute.

An appeal under Cr. Code 879, from a summary conviction in the Province of Quebec to the Court of Queen's Bench of that Province can only be taken where the offence charged is one within the legislative authority of the Parliament of Canada, and not where the offence is against a provincial statute.

LECOURS v. HURTUBISE, (QUE.) 521

Supreme Court of Canada—Jurisdiction.

The right of appeal in criminal cases to the Supreme Court of Canada from the decision of a Court of Criminal Appeal is restricted to cases where the conviction has been affirmed by the Court of Appeal, and then only in case one or more of the judges of the latter court has dissented from the decision of the majority of the court.

If by the decision of the Court of Appeal, the conviction is set aside and a new trial ordered, there is no appeal therefrom to the Supreme Court of Canada.

The dissent from the 'opinion' of the majority (Cr. Code 742) by any of the judges of the Court of Appeal which is necessary in order to confer the right of a further appeal to the Supreme

Appeal—*Continued.*

Court of Canada has reference to the 'decision' or 'judgment' of such majority in affirmance of a conviction (Cr. Code 750); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision is not reviewable by the Supreme Court of Canada.
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Legality of—Arrest on telegram—Cr. Code 22, 552.

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Cr. Code sec. 22 operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful; and it applies, not only when the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest.

Cr. Code, sec. 552 (7a), applies only to cases coming within sub-section 7, and it is not necessary in other cases to bring the person arrested before a justice of the peace before noon of the day following the arrest. R. v. CLOUTIER, (MAN.) 43

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Wounding with intent—Preliminary inquiry—Reducing charge to assault—Bar of civil action.

Justices of the peace have no jurisdiction to summarily convict for 'assault' when the only information before them is for an offence beyond their summary jurisdiction.

On a charge of shooting and wounding with intent, the justices holding a preliminary enquiry cannot, of their own motion, vary or reduce the charge to one of common assault and so acquire jurisdiction to adjudicate thereupon.

The presence of the wounded person as a witness at the preliminary enquiry in which a peace officer was the complainant, and the failure of such person to object to the charge being so dealt with by the justices, do not constitute acquiescence therein by him.

The wounded person being in such case a witness only, is not bound to object; and his failure to do so is not an election on his part to proceed before the justices as regards their powers of summary trial.

A certificate of conviction by justices for common assault under those circumstances, and the payment of the fine imposed, do not bar a civil action by the injured party for damages against the wrongdoer, and sec. 866 of the Criminal Code does not apply. MILLER v. LEA, (ONT.) 282

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Justices of the Peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction.

A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict.

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The practice in Certiorari proceedings of never awarding costs either in favor of or against the Crown is to be considered as no longer in force in British Columbia. R. v. LITTLE (B.C.) 240

Summary conviction—Variance—Mistake.

If by mistake an information against the same defendant on another charge for unlawfully selling intoxicating liquor is returned on a certiorari to remove the proceedings in respect of an offence of keeping liquor for sale, the magistrate's affidavit may be received to explain the apparent variance between the information and the conviction, and the conviction should not be quashed if the explanation is satisfactory.

Where the variance in the date of the offence as it appears in the information returned with the conviction upon a certiorari is manifestly a clerical error, and the proceedings are otherwise regular, the conviction should not be quashed.

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Summary conviction—Review of findings.

The court will not review on certiorari the magistrate's finding upon a question of fact which he was competent to try, although an affirmative finding as to such fact is essential to the validity of the conviction. R. v. CUNERTY, (ONT.) 325

Statutory restriction of certiorari proceedings.

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Appeal from order granting writ—Practice.

Where an appeal is pending from an order granting a writ of certiorari, but the writ has, notwithstanding the appeal, been issued and the conviction has been returned thereunder, the court will postpone the hearing of a motion to quash the conviction until after the appeal is disposed of.

The same rule applies where the certiorari is in respect of a forfeiture order only, and the motion to quash is in respect of a conviction upon which the forfeiture order is based, and which was returned with it. R. v. HURLBURT, (N.S.) 331

Recognizance—Practice in Ontario.

In Ontario a surety upon a recognizance filed on a motion to quash a summary conviction, must justify in the sum of $100 over and above any amount for which he may be surety as well as over and above his debts.

A rule of Court passed before the enactment of the Code under the section of the Summary Convictions Act (Can.) now incorporated in the Criminal Code as sec. 892, as to recognizances on motions to quash convictions, remains in force as a rule under the Code without being re-passed. R. v. ROBINET, (ONT.) 382

Recognizance—Sufficiency of justification by sureties.

An affidavit of justification upon a recognizance given pursuant to Rule of Court passed under sec. 892 of the Criminal Code, need not state that the surety is worth the amount of the penalty over and above other sums for which he is surety.

A rule made under sec, 892 of the Criminal Code requiring sufficient sureties for a specific amount is complied with if the

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A summary conviction which does not show on its face that the alleged offence was committed within the territorial jurisdiction of the magistrate should not be quashed, if the warrant which was issued to compel the attendance of the accused to answer the charge was returned with the certiorari and shows that the accused was charged with an offence within the magistrate's territorial jurisdiction.

Semble, the "depositions," upon perusal of which the court may be satisfied that an offence has been committed over which the justice has jurisdiction and may under Cr. Code 889 decline to quash a conviction for insufficiency, etc., will include the caption to the depositions; and if such caption states that the "charge" was read over to the accused, the court may refer to the statement of the charge contained in the "warrant to apprehend," in order to ascertain whether or not the evidence taken related to an alleged offence committed within the district for which the magistrate acted. R. v. MCGREGOR, (ONT.) 410

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Per RICHARDSON and WETMORE, JJ.—The conviction was not regularly before the court, and a writ of certiorari to bring it there was necessary before a motion to quash the conviction could be properly entertained.

Per Curiam.—The grounds taken on the motion to quash the conviction being the same as those taken and disposed of by a single judge on a stated case, the matter was res judicata.

R. v. MONAGHAN, (N.W.T.) 488

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The costs which may be allowed on the appeal are in the discretion of the judge apart from the tariffs of costs applicable to other proceedings as to which he has jurisdiction; and when such an appeal is taken to a County Court judge, his allowance of costs according to the County Court tariff should not be interfered with. R. v. MCINTOSH, (ONT.) 114

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Commitment—*Continued.*

Wrong description of magistrate's official designation.

A warrant of commitment signed by magistrates as "Justices of the Peace in and for the County of Labelle," no justices being appointed with such designation and no such title existing at law, is illegal, and, when no application is made for its amendment, should be quashed, and the prisoner discharged upon habeas corpus.

Justices for a judicial district assuming to act as justices in and for a county named, although such county is included within the district, will not be presumed to have acted as justices for the district in which the county is situate.

EX PARTE WELSH, (QUE.) 35

In default of giving security to keep the peace.

A warrant of commitment by a justice under Cr. Code, 959 (4), for default in finding sureties to keep the peace must show on its face that the complainant feared bodily injury because of the defendant's threat, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of his person from injury. (Code Form WWW.) R. v. JOHN MCDONALD, (N.S.) 64

Inquiry commenced by one and completed by two justices.

Where evidence on a preliminary inquiry is commenced before one justice of the peace and finished before two justices, a committal by the two is irregular unless both have heard all the evidence. RE NUNN, (B.C.) 429

Stating costs of conveying to gaol—Inland Revenue Act.

Where a conviction is made under the Inland Revenue Act (Can.), and a money penalty is imposed and in default imprisonment for a fixed term unless the penalty and the costs and charges of conveying the accused to gaol are sooner paid, it is necessary that the amount of the latter costs and charges should be stated in the warrant of commitment (Inland Revenue Act, s. 113); and where not so stated the prisoner is entitled to be discharged on habeas corpus. R. v. CORBETT, (N.S.) 499

Commitment under wrong name—Identity of accused.

A person who is charged under a wrong name, and who pleads without objection to same, is not entitled after conviction to be released under a writ of habeas corpus on the ground that she is not the person against whom the commitment was issued.

EX PARTE CORRIGAN, (QUE.) 591

Defective commitment reciting an invalid conviction. 302

Company

Publishing false statement—Locality of crime—Place of mailing or place of receipt of post letter.

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed.

In such case, the Courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district.

R. v. GILLESPIE (No. 2), (QUE.) 309

And see CORPORATION.

Complaint

See INFORMATION.

Conduct

False pretence by, 505, 512

Confession

See EVIDENCE.

Consent

See OBJECTION.

Constitutional law

Number for panel—Number to find true bill.

It is within the power of a Provincial Legislature to fix the number of the grand jurors who should compose the panel, that being part of the organization or constitution of the Court.

A Provincial Legislature has no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion Parliament. R. v. COX, (N.S.) 207

Mixed jury—Criminal procedure.

A statute of the former Province of Canada in force at the time of Confederation which conferred the right to a mixed jury in Lower Canada, now the Province of Quebec, remains in force thereafter as a matter of 'criminal procedure' as to that province, and can be varied or repealed only by the Parliament of Canada. B.N.A. Act, sec. 91 (27). R. v. YANCEY, (QUE.) 320

Note on provincial statutes imposing penalties. 278

Construction of statute

See WORDS AND PHRASES.

Conviction

Fine—Adjudication of forfeiture.

A summary conviction by a Justice of the Peace, whereby a fine is sought to be imposed, must adjudge forfeiture of the amount as well as payment thereof; and if a commitment be made in default of payment, the prisoner is entitled to be discharged under habeas corpus if the conviction merely adjudges that he "forthwith pay" a sum named and that in default of payment he be imprisoned. R. v. CROWELL, (N.S.) 34

Uncertainty—Disclosure of several offences.

The disclosure in the defendant's testimony of several illegal sales made on the same day in a liquor license prosecution in which he is compelled to testify for the prosecution does not invalidate a conviction thereon for illegally selling liquor, although such conviction does not specify to which of such sales the same relates. R. v. NURSE, (ONT.) 57

Uncertainty and duplicity in conviction.

A conviction for "unlawfully procuring *or* attempting to procure" a girl to become a prostitute, is void for duplicity and for uncertainty.

Section 800 of the Criminal Code does not validate a defective commitment, if it recites a conviction which is on its face invalid. R. v. GIBSON, (ONT.) 302

Motion to quash without certiorari.

If a conviction has been filed by the magistrate under sec. 801 of the Criminal Code, in a court of superior criminal jurisdiction, a motion may be made to quash the same without the necessity of a writ of certiorari.

Section 892 of the Criminal Code authorizes the requiring of a recognizance only where the conviction is brought before the court by a writ of certiorari, and no recognizance is required where such a writ is not necessary or is dispensed with.

R. v. ASHCROFT, (N.W.T.) 385

For profane language—Omission to set out the words.

A conviction for using profane language on a public street is invalid unless the words complained of are therein set out.

R. v. SARAH SMITH, (N.S.) 485

Conviction as a 'minute of adjudication.'

A conviction in extended form if drawn up at the time when the "minute of adjudication" should be made and in lieu of it, is a sufficient compliance with a statutory requirement of a minute of adjudication. EX PARTE FLANNAGAN, (N.B.) 513

Convicts

Act of 1899 to provide for the conditional liberation of. 600-612

Coroner

Depositions of witness at Coroner's inquest.

A coroner is not 'a justice' within the meaning of Cr. Code 687 as to using upon a trial the depositions 'taken by a justice in the preliminary or other investigation of any charge,' of a witness absent from Canada. R. v. GRAHAM, (QUE.) 388

Corporation

Liability to summary conviction before justices.

The procedure of the Criminal Code as to summary convictions applies as well to corporations as to natural persons.

The fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment, does not prevent the application of the summary procedure in other respects to corporations.

Notice of a summons by justices under the Summary Convictions clauses of the Criminal Code may be given in a manner similar to a notice of indictment under Cr. Code 637.

R. v. THE TORONTO RAILWAY COMPANY, (ONT.) 471

No preliminary inquiry against, for indictable offence; proceedings by indictment. 252, 254

Summary proceedings against; distinction between matters of jurisdiction and of procedure. 482

And see COMPANY.

Corroboration

See EVIDENCE.

Costs

Summary conviction—Excessive fees.

The allowance by the magistrate on a summary conviction, of excessive costs in respect of mileage to the constable for serving subpœnas upon witnesses, is not a ground for quashing the conviction. EX PARTE RAYWORTH, (N.B.) 230

Of motion for certiorari—Nova Scotia Crown Rules.

In Nova Scotia, if the magistrate and the informant appear upon and unsuccessfully oppose an application for a writ of certiorari to remove a conviction, they may be ordered to pay the costs of the motion in the event of the conviction being quashed. R. v. SARAH SMITH, (N.S.) 485

Costs—*Continued.*

Of conveying to gaol—Customs Act (Can.)

A warrant of commitment by justices in default of payment of a fine imposed under the Customs Act for smuggling, and under which the accused is required to pay also the expenses of being conveyed to gaol before he can obtain his liberty, is invalid if the amount of such expenses are not stated therein.

R. v. THOMAS MCDONALD, (N.S.) 504

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Defence
'Full answer and defence'—Cr. Code 850.
The accused is not denied the right to make "full answer and defence" to the charge (Cr. Code 850), by reason of the magistrate having stated, after hearing the evidence for the prosecution, that a denial on oath by the accused would not alter his opinion as to her guilt. R. v. MCGREGOR, (ONT.) 410
Refusal of magistrate to give evidence for the defence.
Where the presiding magistrate is called as a witness for the defence, but refuses to be sworn, a summary conviction made without his evidence should not be quashed unless it is shown that the request to have the magistrate called as a witness was made in good faith by the defence, that the magistrate could give material evidence, and that the accused was therefore prejudiced. EX PARTE FLANNAGAN, (N.B.) 513
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Depositions
See EVIDENCE.

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Disqualification of magistrate
Bias—Relationship to prosecutor—Sharing fine.
To invalidate a conviction on the ground of bias in the convicting magistrate, it is not necessary that actual bias should be proved, and a conviction will be quashed if the facts justify a reasonable apprehension of bias.
If the accused is aware of the disqualifying circumstances at the time of the hearing before the magistrate, he should take objection then to the magistrate acting.
Where the prosecutor in summary proceedings is the magistrate's father, and the statute under which the prosecution is

Disqualification of magistrate—*Continued.*

brought entitles the prosecutor to a share of any fine imposed, the justice is disqualified from adjudicating upon the case. A conviction made under such circumstances will be quashed, although there was no conflicting evidence on the summary trial. R. v. STEELE, (ONT.) 433

Bias—Relationship—Ratepayer.

A magistrate is not disqualified from trying a charge laid by a chief license inspector of unlawfully selling liquors, because of the assistant license inspector's wife being a niece of the magistrate, if the assistant inspector had in fact nothing to do with the laying of the charge, and took no part in the prosecution.

A magistrate is not disqualified from adjudicating upon an information by reason of his being a ratepayer of a municipality into whose treasury any fine imposed in the case would be payable when realized. EX PARTE FLANNAGAN, (N.B.) 513

Note on disqualification of magistrate for bias. 442

Distress

Before commitment.

A conviction under the Canada Temperance Act may by virtue of Cr. Code, sec. 872 (*b*), direct imprisonment in default of payment of the fine and costs, without any award of a distress upon the defendant's goods. EX PARTE CASSON, (N.B.) 483

Dying declaration

Expectation of death.

The question as to whether there was a settled hopeless expectation of death, so as to justify the admission of a dying declaration in evidence, is for the presiding judge at the trial. R. v. WOODS, (B.C.) 159

Informal deposition as a dying declaration.

A deposition read over to and signed by the deponent may be admissable in evidence as a dying declaration, although irregular as a deposition under Cr. Code 687 because taken in the absence of the accused. R. v. WOODS, (B.C.) 159

Evidence

Former deposition—Contradiction of testimony by.

The oral statement of a witness on his examination before a magistrate, reduced to writing by the magistrate, must be proved by the writing if it can be produced, but if the depositions have been lost or stolen, and no copy of them is under

Evidence—*Continued.*

the control of the party adducing the evidence, it is then not necessary to prove the contents of the written record of the evidence; and the statement of a witness who was present at the examination will be admissible. R. v. TROOP, (N.S.) 22

'Res Gestæ'—Assault.

In a prosecution for an assault occasioning actual bodily harm (Cr. Code, 262), it is improper to exclude evidence of statements sworn to by a witness for the prosecution at a preliminary enquiry, the record of the depositions whereat had been lost, as to what was said by the accused at the time of the assault, as such statements of the witness had reference to statements of the accused forming a part of the *res gestæ*.
R. v. TROOP, (N.S.) 22

Oral evidence where depositions lost.

A witness who has been cross-examined as to an alleged previous statement made by her under oath, in judicial proceedings relative to the subject matter of the case, and who after mention to her of the circumstances designating the particular occasion, has denied that she made the alleged statement, may in case of the loss of the depositions containing the record of what was then sworn to, be contradicted by oral testimony regarding the disputed statement. R. v. TROOP, (N.S.) 22

Weight of evidence—Question for jury—New trial.

It is the province of the jury, after taking into consideration the circumstances of a case and the character and demeanor of the witnesses, to discredit some of the witnesses and reject their evidence, and to believe others and accept their evidence; and when there is a conflict in the evidence, but there is evidence to support the verdict, it cannot be juridically maintained that the verdict is against the weight of evidence.

When, however, there is no conflict in the evidence, and it tends indubitably in a direction favorable to the defendant, or does not establish his guilt, a verdict convicting the defendant would not be supported by nor be based upon proper evidence, and would manifestly be against the weight of evidence; and where there is an absolute failure of evidence to sustain the verdict, the Court can give leave to apply to the Court of Appeal for a new trial. R. v. HARRIS, (QUE.) 75

Obtaining goods by false pretences—Proof of continuing pretence until delivery.

To prove a charge of obtaining goods by false pretences where there is a lapse of time between the making of the pretence and

Evidence—*Continued.*

the delivery of the goods, there must be a direct connection between them constituting the former a continuing pretence up to the time of delivery. R. v. HARTY, (N.S.) 103

Proof of marriage—Evidence of death of former husband

Where the complainant in a charge of non-support of wife had been previously married, but had always lived apart from her first husband, and swore to having heard two years before the second marriage that her husband was dying in a foreign country, and that about a year after her second marriage she again heard that her husband was dead, such was held to be evidence to go to the jury to prove that her first husband had died before her marriage to the defendant.

R. v. HOLMES, (ONT.) 131

Confession—Admissibility—Inducement by prosecutor.

Evidence is inadmissable of a confession by the accused that he had stolen money from his employer, when such confession was induced by a statement of the employer that it would be better for the accused to confess, and that if he did not do so, he, the employer, would send for an officer.

R. v. JACKSON (N.S.) 149

Confession—Admissibility—Threat or inducement.

A confession by an accused person charged with stealing post-letters, induced by a false statement made to him by a detective employed by the prosecution, in presence of a post office inspector, that the accused had been seen taking the letters, will render the confession inadmissible in evidence against the accused. R. v. MACDONALD, (N.W.T.) 221

Deposition of witness at Coroner's inquest—Admissibility at trial—Necessity of verbatim record of evidence.

A coroner is not 'a justice' within the meaning of Cr. Code 687, which provides for using upon a trial the depositions 'taken by a justice in the preliminary or other investigation of any charge,' of a witness absent from Canada.

A deposition to be admissible under Cr. Code 687 must be a *verbatim* record of the witness' evidence.

The evidence of a constable searching for a witness to serve him with a subpœna for the trial, that he had been informed by a person named that the witness was absent from Canada, is not sufficient evidence of such absence to render the witness' deposition admissible under Cr. Code 687. R. v. GRAHAM, (QUE.) 388

Depositions on preliminary inquiry, of witness since deceased—Admissibility at subsequent trial.

In order that sec. 687 of the Criminal Code should apply to make admissible as evidence at the trial the deposition of a

Evidence—*Continued.*

witness, since deceased, taken on a preliminary inquiry or other investigation of a charge against the accused before a justice of the peace, the document containing the deposition is alone to be looked at to ascertain if the deposition "purports to be signed by the justice," as is required by that section.

Where the deposition sought to be used had been signed by both the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," or the date when taken, or any record by the magistrate certifying that such added deposition had been *taken by* him, and the first depositions formed in themselves a complete document concluding with the magistrate's note of the remand of the case, it is not to be presumed that the informal deposition following the formal document is a continuation of the first deposition (in which appeared no reference to the added deposition), or that it relates to the same charge, and it was held that such added deposition did not "purport to be signed by the justice by or before whom the same purports to have been taken." (Cr. Code 687.)

A deposition, the caption of which sets out the name of the justice and describes him as one of the justices of the peace for a named county, "purports to be signed by the justice by or before whom the same purports to have been taken," if the same is signed by the justice with his name only, without adding to it, as in form S of the Code, the initials "J.P." and the name of the county for which he is a justice; and such a deposition is prima facie admissible in evidence. (Cr. Code 687.)

Per Killam, J.—The deposition of a deceased witness may be used in evidence apart from sec. 687, Cr. Code, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken," but, where it is not admissible by virtue of sec. 687, it must be affirmatively shown that all the formalities required to be observed in taking depositions (Cr. Code 590) have been complied with.

R. v. HAMILTON, (MAN.) 390

Confession obtained by holding out hope of clemency—Evidence admitted and afterwards struck out—New jury.

Where an alleged confession is received in evidence after objection by the accused, and the trial judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impaneled.

Evidence—*Continued.*

If the trial judge refuses to impanel a new jury in such a case, a new trial will be ordered by a Court of Appeal.

On the motion before the Court of Appeal for a new trial the court will not determine the question of the admissibility of the alleged confession. R. v. SONYER, (B.C.) 501

Forgery—Corroboration—Comparison of handwriting.

A witness who testified that the forged signatures were written by the accused is not corroborated in a 'material particular by evidence implicating the accused' by proof that certain other signatures were in the same handwriting, when the only evidence showing that the latter signatures were written by the accused was the testimony of the *same* witness who had testified to the handwriting of the signatures first mentioned.

R. v. MCBRIDE, (ONT.) 544

Res gestæ; note on admissibility of declaration as part of. 33

Whether confession a voluntary one; onus upon prosecution. 152

Recent possession as evidence of stealing. 291, 295

Proof of license in charges against licensees under liquor license laws. 364

Note on corroboration of evidence of forgery. 546

See DYING DECLARATION.

See EXTRADITION.

Excuse

See WITNESS.

Extradition

For larceny—Common law offence.

Under the Extradition Convention of 1889 between Great Britain and the United States by which 'larceny' was made an extraditable crime, whatever was then larceny both in Canada and in the State in which the alleged crime was committed was thereby made an extradition offence.

The abandonment of the term 'larceny' in Canadian jurisprudence on the enactment of the Criminal Code of Canada subsequent to an extradition convention including such offence, does not affect the liability to extradition of a person charged with an offence which was larceny at common law and which is by the Criminal Code still an offence in Canada under the name of 'theft' or 'stealing.' RE GROSS, (ONT.) 67

Foreign depositions—Irregularity—Confessoin.

Depositions taken in the foreign state, which are certified to have been sworn to at a date subsequent to that of the

Extradition—*Continued.*

foreign warrant of arrest are irregular, and extradition will not be granted on such evidence alone.

To justify the admission in evidence in extradition proceedings of an alleged confession of the prisoner, it must be affirmatively proved that such confession was free and voluntary, and was not preceded by any inducement held out by a person in authority, or was not made until after such inducement had clearly been removed. RE OCKERMAN, (B.C.) 262

Proof of foreign law—Forgery.

Per HAGARTY, C.J.O., and MACLENNAN, J.A.—If such a *prima facie* case is made out in extradition proceedings as would warrant a committal for trial upon a preliminary enquiry before a magistrate under the law of Canada had the charge been that the accused had committed in Canada an offence known by the same name as the extradition crime charged, the prisoner must be extradited, although it is not proved by the prosecution that the alleged offence is a crime under the law of the demanding country.

Per BURTON and OSLER, JJ.A.—It is necessary for the prosecution to make out a *prima facie* case that the alleged offence is a crime according to the law of the demanding country as well as under Canadian law.

Per BURTON and OSLER, JJ.A.—Where the facts shown in extradition proceedings for forgery disclose a prima case in respect of an offence which is forgery only by virtue of the extended meaning given to that term by Canadian statutes, it is necessary for the prosecution to prove that the same is also forgery under the law of the foreign country in which the alleged offence was committed. RE MURPHY, (ONT. C.A.) 578

Defective warrant of commitment—Perusal of depositions on habeas corpus motion.

Upon habeas corpus proceedings following a commitment under an extradition warrant, the court is not justified in referring to the depositions returned, and inferring therefrom facts material to the proof of the offence, if the warrant of commitment is in itself defective in that it does not recite a finding of such facts. RE MURPHY, (ONT.) 562, 578

Note on extradition with U.S.A.; Ashburton Treaty, 1842; Convention of 1889; what are extraditable offences. 71

Of convicted persons; proof of identity, and of conviction. 73

Disposal of articles in possession of fugitive when arrested. 74

Person surrendered not to be held for other crimes. 74

Note on foreign depositions as evidence. 265

False document

Uttering forged document.

Where a fraudulent conspiracy was entered into between two persons in pursuance of which one of them opened an account in a bank in a fictitious name, and gave to the other a cheque, for which the latter knew there were no funds, drawn in the fictitious name, and the same was negotiated by the payee in furtherance of such conspiracy by obtaining another bank to cash the same on the faith of its being a genuine cheque, the cheque is a 'false document' both by the Criminal Code (sec. 421) and at common law. RE MURPHY, (ONT.) 562

False pretences

Obtaining goods by—Continuing pretence.

To prove a charge of obtaining goods by false pretences where there is a lapse of time between the making of the pretence and the delivery of the goods, there must be a direct connection between them constituting the former a continuing pretence up to the time of delivery.

The word "owner" following the signature of the accused in a letter written by him inviting negotiations for the charter of a vessel in his possession and managed by him, does not in itself constitute a repesentation by the accused that he is the "registered owner." R. v. HARTY, (N.S.) 103

Indictment on new charge founded on depositions before magistrate.

An indictment for obtaining money under the false pretence that the prisoner had in his warehouse certain produce belonging to the person from whom the money was obtained will not be quashed under sec. 641 of the Criminal Code, although the offence for which the accused was committed for trial was that of stealing the produce mentioned, if the facts disclosed on the depositions taken before the magistrate were sufficient to found a charge of false pretences.

Where the false pretence was erroneously laid in the indictment as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial judge may allow an amendment of the indictment to conform with the proof. (Cr. Code 723.)

Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would

False pretences—*Continued.*

not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. (Cr. Code 723.)
R. v. PATTERSON, (ONT.) 339

Pretence by conduct—Debtor receiving rent after insolvency proceedings.

A charge of obtaining money under false pretences may be supported by showing a false pretence by the conduct and acts of the accused, and such pretence need not be in words or writing.
A debtor who has made a judicial abandonment for the benefit of his creditors whereby his property becomes vested in another, and who, knowing that he no longer had any right to receive the rent, presents himself afterwards as landlord to a tenant of the property, and receives the rent as he had formerly been accustomed to do, is guilty of a false pretence by his acts and conduct.
The question whether the facts disclosed in a case constitute the crime of obtaining money by conduct amounting to false pretences, is not a question of law but an issue of fact within the province of a jury, and cannot be made the subject of a reserved case. R. v. LÉTANG, (QUE.) 505

Legality of arrest on telegram upon charge of. 43
Stating nature of the false pretence in indictment. 347
Distinction from "theft." 512
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False statement

See COMPANY.

False trade description

See TRADE MARK.

Fine

Forfeiture must be adjudged.

A summary conviction by a Justice of the Peace, whereby a fine is sought to be imposed, must adjudge forfeiture of the amount as well as payment thereof. R. v. CROWELL, (N.S.) 34

Forcible entry

Forcible entry—Intent—Interference with possession.

To constitute a 'forcible entry' on land under the Criminal Code sec. 89, the act of going upon the land must be done with the intention of taking possession of the land itself.
An entry upon the land for the purpose of seizing and taking away chattels thereon is not a 'forcible entry' under sec. 89 of the

Forcible entry—*Continued.*

Criminal Code, although made contrary to the will of the occupant and in a manner likely to cause a breach of the peace; and such an entry is a mere trespass. R. v. PIKE, (MAN.) 314

Forgery

Corroboration of evidence of forgery. 544, 546

Uttering a false document; extradition. 562, 578

Foreign law

See EXTRADITION.

Forfeiture

See FINE.

Former deposition

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Grand Jury

Number for panel—Number to find true bill.

It is within the power of a Provincial Legislature to fix the number of the grand jurors, who should compose the panel, that being part of the organization or constitution of the court. A Provincial Legislature has no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion Parliament. R. v. COX, (N.S.) 207

Panel not exceeding thirteen—Absence of juror.

In provinces where the grand jury has been reduced to thirteen jurors or less, the failure of some of the summoned jurors to attend will not invalidate a bill to which at least seven of the jurors in attendance agree. R. v. GIRARD, (QUE.) 216

Note on the constitution of a grand jury; number necessary to the finding of a true bill. 213

Habeas Corpus

Proceedings of a 'Court of record'—Trial by police magistrate with consent.

A police magistrate trying a prisoner with his own consent for an offence triable at a Court of General Sessions, does not

Habeas Corpus—*Continued.*

constitute a "court of record" within the meaning of the Ontario Habeas Corpus Act.

The exception contained in the Habeas Corpus Act, R.S.O. 1897, c. 83, as to convictions or orders of a court of record, Court of Oyer and Terminer or general gaol delivery, or Court of General Sessions of the Peace, only bars the granting of a writ of habeas corpus in respect of a court of record not specifically named in such exception, when such court of record is not inferior to or less principal than the High Court of Justice. R. v. GIBSON, (ONT.) 302

Supplementary return of fresh warrant.

The return to a writ of habeas corpus should be brought into court and there read before it is filed, and a supplementary return of a second warrant of commitment intended to remedy a defect in the first warrant may be read in conjunction with the return of the first warrant as together constituting the return to the writ. RE MURPHY, (ONT.) 562, 578

Remand under defective extradition commitment.

Upon a commitment in extradition proceedings there is no jurisdiction other than that which is conferred by statute to take proceedings for the detention of the accused in respect of the crime charged; and the court has no inherent power on a motion for his release in habeas corpus proceedings to remand a prisoner held under a detective warrant.

Upon habeas corpus proceedings following a commitment under an extradition warrant, the court is not justified in referring to the depositions returned, and inferring therefrom facts material to the offence, if the warrant of commitment is in itself defective in that it does not recite a finding of such facts. RE MURPHY, (ONT.) 562, 578

Exclusion as regards convictions by 'courts of record'; Note on question of jurisdiction. 306

Husband and Wife

Non-support—Evidence of death of former husband.

Where the complainant in a charge of non-support of wife had been previously married, but had always lived apart from her first husband, and swore to having heard two years before the second marriage that her husband was dying in a foreign country, and that after her second marriage she again heard that her husband was dead, such was held to be evidence to go to the jury to prove that her first husband had died before her marriage to the defendant. R. v. HOLMES, (ONT.) 131

Husband and Wife—*Continued.*

Non-support—Refusal of wife to live with husband.

In order to constitute a wilful refusal or neglect on the part of a husband to maintain his family, under Cr. Code sec. 207 (*b*), it is necessary that he should be under a legal obligation to do so, and his failure to maintain his wife, who had left him without valid cause and refused to return, is not an offence under that section. R. v. LECLAIR, (QUE.) 297

Note on wilful refusal or neglect of husband to maintain his wife. 300

Identification

Criminals' Identification Act (Can.) 1898. 602

Identity

See COMMITMENT.
See EXTRADITION.
See NAME.

Illicit Distilling

Warrant of commitment—Costs of conveying to gaol.

Where a conviction is made under the Inland Revenue Act (Can.), and a money penalty is imposed, and in default imprisonment for a fixed term unless the penalty and the costs and charges of conveying the accused to gaol are sooner paid, it is necessary that the amount of the latter costs and charges should be stated in the warrant of commitment (s. 113); and where not so stated the prisoner is entitled to be discharged on habeas corpus. R. v. CORBETT, (N.S.) 499

Discretion to exempt from either of the statutory penalties of fine and imprisonment. 19

Imprisonment.

See COMMITMENT.

Incapacity for Crime

Legal incapacity of accused under fourteen, as to certain crimes. 12, 17

Indian Act.

R.S.C., 1886, c. 43, s. 94. 488

Indictment

Sufficiency of—Amendment—Cr. Code 285.

If an indictment does not include in the statement of the charge all the essential ingredients of a criminal offence, it is defective and cannot be sustained.

Indictment—*Continued.*

An indictment charging the publication of a defamatory libel, but not alleging that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, is bad by reason of the omission of an essential ingredient of the offence. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance.

R. v. CAMERON, (Que.) 173

Recognizance to prosecute—Attendance before Grand Jury of party bound over—"Preferring" of Indictment.

Per MCDONALD, C.J., RITCHIE and TOWNSHEND, JJ.—A party bound over by recognizance to prosecute need not personally attend at the sittings of the Court, to prefer an indictment before the Grand Jury unless required to give evidence, and an indictment found in his absence is valid although no order of the Court, judge's consent, or special direction of the Attorney-General, was given to prefer the same.

Per RITCHIE, J.—The Crown prosecutor or counsel appointed for the sittings of the Court sufficiently represents a prosecutor so bound over, to validate the preferring of the indictment by such officer, and the same is to be considered as preferred on behalf of the prosecutor.

Per WEATHERBE, J., GRAHAM, E.J., and HENRY, J.—The preferring of an indictment by an agent of the Attorney-General acting under a general appointment to attend to all criminal cases at a session of the Court, without having obtained the special direction of the Attorney-General or an order or consent under Cr. Code, sec. 641, is not a compliance with the latter section which requires the indictment to be preferred by the person bound over by recognizance to prefer the same; and if the latter fails to appear, the indictment should be quashed.

R. v. HAMILTON, (N.S.) 178

Form of Indictment—Description of offence.

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity." R. v. DOYLE, (N.S.) 335

New charge founded on depositions before magistrate—Motion to quash.

An indictment for obtaining money under the false pretence that the prisoner had in his warehouse certain produce belong-

Indictment—*Continued.*

ing to the person from whom the money was obtained will not be quashed under sec. 641 of the Criminal Code, although the offence for which the accused was committed for trial was that of stealing the produce mentioned, if the facts disclosed on the depositions taken before the magistrate were sufficient to found a charge of false pretences. R. v. PATTERSON, (Ont.) 339

Amendment of indictment—Particulars.

Where in an indictment for obtaining money under false pretences the false pretence was erroneously laid as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial judge may allow an amendment of the indictment to conform with the proof. (Cr. Code 723.)

Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. (Cr. Code 723.) R. v. PATTERSON, (ONT.) 339

Formalities of, what defects amendable. 338

Information

Defect in—Waiver.

If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shown that the information was not in fact sworn at such time and place. EX PARTE SONIER, (N.B.) 121

Defects or irregularities in information in summary proceedings. 121, 124

Inland Revenue Act

Amendments of 1897. 593, 597
Amendment of 1898. 594
See ILLICIT DISTILLING.

Insolvency

False pretences by debtor receiving rent after judicial abandonment; insolvency proceedings terminating authority. 505

Interpretation

Of statute—"May"—Cr. Code 880 (e).

When a statute confers an authority to do a judicial act upon the occurrence of certain circumstances, and for the benefit of an interested party, the exercise of the judicial authority so conferred is imperative and not discretionary when applied for by the interested party. FENSON v. NEW WESTMINSTER, (B.C.) 52

Note on interpretation of enabling words. 55

And see WORDS AND PHRASES.

Inter-provincial procedure

See ARREST.

Intoxicating liquors

See LIQUOR LICENSE.

Irregularity.

Note on irregularity in informations. 124

Jurisdiction.

Interference by other justices at hearing.

When an accused person is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings without associate justices, other justices of the peace are not entitled to interfere in the preliminary enquiry or summary trial, or to be associated with the summoning justice, except at the latter's request.

A summary conviction by the magistrate who summoned the accused and heard the charge will be supported, although three other magistrates attended the hearing and purported to dismiss the charge, if the latter magistrates sat without the request or consent of the summoning magistrate.

R. v. MCRAE, (ONT.) 49

Magistrate—Adjournment sine die to consider judgment.

An adjournment *sine die* of summary proceedings before a magistrate for the purpose of delivering judgment is illegal, and a conviction thereafter made by the magistrate, in the absence of the accused, is void for want of jurisdiction.

R. v. QUINN, (ONT.) 153

Preliminary inquiry—Reducing charge.

Justices of the Peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction. R. v. LEE, (ONT.) 233

Jurisdiction—*Continued.*

Of magistrate—False trade description—Corporation.

Magistrates have no summary jurisdiction to adjudicate upon a charge under Cr. Code sec. 448 of selling goods to which a false trade description was applied.

Proceedings upon such a charge against a corporation should be instituted by indictment under Cr. Code sec. 635-639, and not by a preliminary inquiry before a magistrate.

R. v. T. EATON COMPANY, LIMITED, (ONT.) 252

Continuing offence—Completion in another Province.

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed.

In such case, the Courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district in which the letters were delivered. R. v. GILLESPIE. (No. 2.) (QUE.) 309

Reference to warrant as to locality of offence. 410

Justice of the Peace—Preliminary inquiry commenced by one justice and completed by two.

Where evidence on a preliminary inquiry is commenced before one justice of the peace and finished before two justices, a committal by the two is irregular unless both have heard all the evidence. RE NUNN, (B.C.) 429

County Courts (N.B.); offence of attempting to have carnal knowledge of girl under fourteen. 83

Of magistrate, where offender taken by a railway constable in another county. 332

Matters of jurisdiction as distinguished from matters of procedure. 482

Summary conviction under provincial statute; appeal from; jurisdiction. 521

Of Supreme Court of Canada in appeals in criminal matters; judgment below ordering new trial, but affirming decision at trial on collateral question. 540

Jury

Omission to challenge for cause.

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. R. v. HARRIS, (QUE.) 75

Jury—*Continued.*

Communication between prosecutor and juror.

When a defendant and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor affect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial. R. v. HARRIS, (QUE.) 75

Withdrawal of peremptory challenge.

A peremptory challenge of a juror when once taken must be counted against the party making it, and cannot be withdrawn when the panel is being called over a second time.

R. v. LALONDE, (QUE.) 188

Joint indictment—Number of peremptory challenges.

Where several persons are jointly indicted and tried, the Crown is restricted to the number of peremptory challenges allowed on the trial of one person. R. v. LALONDE, (QUE.) 188

Evidence admitted and afterwards struck out—Discharge of jury—Impanelling new jury.

Where an alleged confession is received in evidence after objection by the accused, and the trial judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impanelled.

If the trial judge refuses to impanel a new jury in such a case, a new trial will be ordered by a Court of Appeal.

R. v. SONYER, (B.C.) 501

Note on challenge of juror for cause; objection "for favor." 81

And see GRAND JURY.

Justice of the Peace

Description of capacity in warrants, etc.

A justice of the peace acting in the illness or absence or at the request of a police magistrate should be designated as so acting, in warrants or other process, otherwise the latter will be invalid.

A warrant signed by a justice of the peace so acting, in which he is described as "police magistrate," is void.

The initials "J.P." following the signature of the person presuming to issue a warrant are not a sufficient description of such person as a justice of the peace for the city or county in which the warrant purports to have been issued. R. v. LYONS, (ONT.) 218

Justification

See LIBEL.

See MANSLAUGHTER.

Keeping the peace

Giving security in default of—Commitment.

A warrant of commitment by a justice under Cr. Code 959 (4), for default in finding sureties to keep the peace must shew on its face that the complainant feared bodily injury because of the defendant's threat, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of his person from injury. (Code Form WWW.) R. v. JOHN MCDONALD, (N.S.) 64

Larceny

See EXTRADITION.

See THEFT.

Libel

Indictment—Sufficiency of—Amendment.

An indictment that does not set up in the statement of the charge all the essential ingredients of an offence against the law is defective and cannot be sustained.

An indictment charging the publication of a defamatory libel, which does not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, is bad by reason of the omission of an essential ingredient of the offence. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance.

R. v. CAMERON, (QUE.) 173

R.S.Q. 2614—Motion for gratuitous subpœnas.

The affidavit in support of a motion for the gratuitous issue of subpœnas for the defendant's witnesses should mention only two facts, viz., that the witnesses therein named are necessary for the defence, and that the accused is poor and needy.

If the defendant exceeds that requirement and gives in addition the particular facts which the required witnesses are expected to prove, the application should be refused, as the granting of it in that form might be a prejudging of the question of the admissibility of the evidence.

In the Province of Quebec, an accused can obtain the issue of subpœnas at the expense of the Government under R.S.Q., art. 2614, only in case of a crime which was a felony before the Criminal Code.

Libel—*Continued.*

As libel was before the Criminal Code only a misdemeanor, the court is not in such a case authorized under that statute to order the gratuitous issue of the subpœnas desired by the accused. R. v. GRENIER (No. 2), (QUE.) 204

Note on indictments for defamatory libel. 176

Limitation of time

See TIME.

Liquor License

Club—Sale of liquors by—Liquor License Act (Ont.)

The steward of an incorporated club placed in charge of liquors purchased by the club for the use of the members and authorized to allow members only to withdraw liquor from the stock upon payment according to a rate fixed by the directors as sufficient to replace the quantity withdrawn, is, in carrying out such instructions without a liquor license, guilty of illegally keeping liquor for sale contrary to the Ontario Liquor License Act.

A withdrawal of liquor from stock by a member or shareholder is under such circumstances a sale by the corporation to him.

R. v. HUGHES, (ONT.) 5

Liquor License Act (Ont.)—Sale by licensee in prohibited hours—Calling defendant as witness for prosecution.

A defendant in a prosecution under the Liquor License Act (Ont.) is compellable to give evidence for the prosecutor, although the prosecutor has first called other evidence as to an alleged specific illegal sale, and has failed to prove the same.

A defendant may be compelled to testify for the prosecution as to *any* illegal sale on the date charged in the information as that on which the offence took place; and the question put to him need not indicate the name of any alleged purchaser, or other particulars which would limit the enquiry to such charges as the prosecution could give particulars of.

R. v. NURSE, (ONT.) 57

Selling in "quantities of not less than three half-pints"—Concurrent sales to one purchaser.

Whether the disposal at the same time and to the same purchaser by a shop licensee, of a quantity of intoxicating liquor of less than three half-pints and of intoxicating liquor of another kind and put up separately which together made the total quantity purchased more than three half-pints, constitutes a "selling, bartering or trafficking" in liquors in quantities of

Liquor License—*Continued.*

not less than three half-pints is a question of fact for the decision of the magistrate; and a conviction therefor under the Liquor License Act (Ont.) should not be quashed if the magistrate's finding is that the sale was in prohibited quantities.

R. v. CUNERTY, (ONT.) 325

Offence by licensee—Proof of license.

A conviction under the Liquor License Ordinance, N.W.T., 1891-92, against a hotel-keeper, for allowing his bar to be open during prohibited hours, is invalid, if the information does not allege, nor is proof made, that the accused held a liquor license for the hotel premises. R. v. HENDERSON, (N.W T.) 364

Statutory restriction of certiorari proceedings.

The Liquor License Act of Nova Scotia, 1895, sec. 117, applies to prohibit the granting of a certiorari in respect of *any* conviction thereunder, unless the applicant makes an affidavit negativing the charge as laid in the information; and without such affidavit, the Court cannot grant the writ, although the sole questions raised are as to the validity of the License Act as regards wholesale transactions, and as to whether the conviction which showed the exact quantity of liquor admittedly sold was not a wholesale transaction. R. v. BIGELOW, (N.S.) 367

Limitation of time for prosecution—Amendment of information.

An information for illegal selling of liquor under the Ontario Liquor License Act cannot be amended so as to charge an offence of a date more than thirty days before the amendment is made.

The power of amending informations under the Liquor License Act, sec. 104, under which the justice may "substitute for the offence charged therein any other offence" against the Act, is controlled by the limitation of time for laying a fresh information (sec. 95), and as to the substituted offence is to be treated as laid on the date of the amendment. R. v. HAWTHORNE, (ONT.) 468

Place of sale—Delivery.

A person licensed to sell liquors by retail at certain premises only, is not guilty of illegal selling because he obtains orders from customers elsewhere, if he puts up the liquors at, and forwards them from, the licensed premises.

R. v. HAZELL, (ONT.) 516

Note on liquor license law as affecting disposal to members of club. 10

Warrant to search premises; irregularity in description of official capacity of magistrate. 218

Liquor License—*Continued.*

Note on sale of prohibited quantity by shop licensee. 330

Sale at place not authorized by license; appropriation and delivery. 518

Locality of Crime

Offence continued and completed in another province or district; Cr. Code 553 (b). 309, 312

Lottery

Exception as to works of arts—Money alternative.

The disposal by a lottery or mode of chance 'of any property' under Cr. Code sec. 205 (1*b*) need not be of any specific article or property, and it will constitute an offence although the winner obtains only the privilege of choosing from certain prizes offered.

The exception from the provisions of Cr. Code sec. 205 in respect of lotteries, which by sec. 205 (6*b*) is made in respect of the distribution of paintings, etc., among ticket holders of any incorporated society established for the encouragement of art, will not apply if money may be had by the winners instead of paintings, etc., and this notwithstanding that the option is wholly that of the society to pay in money one-half the stated value of the painting. R. v. LORRAIN, (ONT.) 144

Magistrate

See DISQUALIFICATION.

See JURISDICTION.

See JUSTICE OF THE PEACE.

Manslaughter

Shooting at supposed 'evil spirit'—Pagan belief.

Homicide under a mistaken Indian belief that the object shot at was not a human being but an evil spirit which had assumed human form and would attack human beings, is manslaughter.

R. v. MACHEKEQUONABE, (ONT.) 138

Justification—Excusable homicide—Reasonable apprehension of grevious bodily harm to wife and children.

Reasonable apprehension of immediate danger of grevious bodily harm to his wife and children, then in the house of the accused, is a justification of shooting the deceased, who was one of a party who had invaded the prisoner's house and committed an wholly unprovoked assault upon him, and who had, up to the time of the shooting, continued their violent and unjustifiable conduct there towards the accused and his family, and were destroying chattels in the house.

Manslaughter—*Continued.*

On a trial for murder, if the trial judge directs the jury that imminent peril of the prisoner's own life or of the lives of his family is a ground of justification for killing, in defence of his household, one of a party committing an unprovoked assault upon him, but does not direct them that a reasonable apprehension of immediate danger of *grievious bodily harm* to the prisoner or to his wife and family is an equal justification, such omission constitutes 'a substantial wrong or miscarriage' occasioned on the trial [Cr. Code 746 (*f*)]; and a new trial should be ordered, where the circumstances shown in evidence are such as to point much more to the latter ground of justification than to the former. R. v. THERIAULT, (N.B.) 444

Menaces

Verbal threats to burn buildings.

Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. EX PARTE WELSH, (Que.) 35

Demand with menaces—Threatening the arrest of debtor.

To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest.

The procuring of possession of goods by a creditor by means of a threat of the debtor's arrest does not constitute "theft", or "stealing" under Cr. Code, sec. 305, if done only for the purpose of holding the goods as security for an overdue debt, as in such case the taking is with "colour of right."

R. v. LYON, (ONT.) 242

Threatening letter—Accusing of offence with intent to extort.

The "offence" to accuse, or threaten to accuse, a person whereof with intent to extort or gain anything from him is made an indictable offence by Cr. Code, sec. 406, need not be an offence under the Code or other Dominion law, but may be an offence under a provincial law. R. v. DIXON, (N.S.) 589

Mileage

See COSTS.

Misdirection

See NEW TRIAL.

Mixed Jury

Right to, in Quebec—'Language of the defence.'

The right to a mixed jury in the Province of Quebec, conferred by 27-28 Vict., c. 41, Statutes of the Province of Canada, still exists in criminal cases, notwithstanding the statute 46 Vict., c. 16 (Que.) purporting to repeal the former Act.

The prosecuted party may, upon arraignment, demand a jury composed for the one-half at least of persons skilled in 'the language of his defence,' whether French or English; but this does not give the accused an option to choose either language as the language of the defence, nor to have at least one-half of the jurors drawn from those skilled in the language in which counsel for the accused proposes to conduct the defence.

The 'language of the defence' in that connection means the language habitually spoken by the accused.

R. v. YANCEY, (QUE.) 320

Murder

See MANSLAUGHTER.

Name

Identity of Accused—Objection to wrong name.

A person who is charged under a wrong name, and who pleads without objection to same, is not entitled after conviction to be released under a writ of habeas corpus on the ground that she is not the person against whom the commitment was issued.

The proper time to take objection to a wrong name under which an accused is charged is before pleading to the charge, at which time the mistake may be corrected by an amendment.

EX PARTE CORRIGAN, (QUE.) 591

Navigable waters

Act of 1899 respecting the protection of. 603

New Brunswick

County Courts (N.B.)—Jurisdiction.

The County Courts of New Brunswick are not Courts of Oyer and Terminer and general goal delivery.

A County Court in New Brunswick has jurisdiction to try the offence of attempting to have carnal knowledege of a girl under fourteen (Cr. Code 270), although the evidence discloses the offence of attempting to commit rape, as to which said court has no jurisdiction. (Cr. Code 540.) R. v. WRIGHT, (N.B.) 83

New Trial

Absolute failure of evidence.

When there is no conflict in the evidence, and it tends indubitably in a direction favorable to the defendant, or does not

New Trial—*Continued.*

establish his guilt, a verdict convicting the defendant would not be supported by nor be based upon proper evidence, and would manifestly be against the weight of evidence; and in cases where there is an absolute failure of evidence to sustain the verdict, the Court can give leave to apply to the Court of Appeal for a new trial. R. v. HARRIS, (QUE.) 75

Improper admission of evidence—"Substantial wrong or miscarriage" at trial.

The intention of sec. 746 of the Criminal Code is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and the improper admission is not necessarily a "substantial wrong or miscarriage." (*Makin* v. *New South Wales* (1894) A.C. 57 distinguished.) R. v. WOODS, (B.C.) 159

Improper admission of depositions.

Where a deposition of a deceased witness taken on an inquiry before a magistrate has been improperly admitted in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. (Cr. Code 746.) R. v. HAMILTON, (MAN.) 391

Judge's charge—Misdirection—Failure to object.

If on a trial for murder a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction. R. v. THERIAULT, (N.B.) 444

Non-Support

See HUSBAND AND WIFE.

North-West Territories

Liquor Licence Ordinance. 364

Nova Scotia

Crown Rules, Supreme Court, No. 34, 191. 485

Liquor License Act, 1895, sec. 117. 367

Objection.

Appeal—Objection not taken below—Cr. Code 882.

Under the Summary Convictions Act (B.C.), sec. 75, (similar to Cr. Code 882), an objection on an appeal from a summary conviction that the by-law under which the prosecution took place is *ultra vires* is not available unless raised on the hearing before the magistrate. R. v. BOWMAN, (B.C.) 89

Objection—*Continued.*

Disqualification of magistrate—Bias—Relationship.

If the accused is at the time of the hearing before the magistrate aware of circumstances disqualifying the latter from acting in the case, he should take the objection before the magistrate at that time. R. v. STEELE, (ONT.) 433

Misdirection—Failure to object.

The strictness of the rule applied in civil cases in some of the provinces by which an objection not raised at a time when it could have been remedied, cannot afterwards be allowed, should not be applied to cases of misdirection in criminal cases. (*R.* v. *Fick* (1866) 16 U.C.C.P. 379, disapproved.)

R. v. THERIAULT, (N.B.) 444

Ontario

Habeas Corpus Act, R.S.O. 1897, c. 83, s. 1.						302
High Court of Justice, General Order as to recognizances.						382
Liquor License Act, R.S.O. 1897, c. 245, s. 2.						325, 330
"	"	"	"	"	s. 53.	5
"	"	"	"	"	s. 54.	57
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"	"	"	"	"	s. 104.	468
"	"	"	"	"	s. 131.	218
Municipal Act, R.S.O. 1897, c. 223, s. 569.						471

Penalty.

'Fine and imprisonment'—Discretion to exempt.

Where a statute of Canada imposes a fine and also imprisonment the punishment is in the discretion of the Court, and the Court is not bound to inflict both, but may inflict either one or the other of the two kinds of punishment by virtue of Cr. Code 932. R. v. ROBIDOUX, (QUE.) 19

Perjury.

Prosecution directed by Court—Committal or Bail.

A committal of a witness under R.S.C. 1886, c. 154, s. 4, pursuant to the judge's direction that he be held and prosecuted for perjury does not prevent the same judge from making an order for bail under that Act, and the judge is not *functus officio* by reason of the first order. RE RUTHVEN, (B.C.) 39

Perjury—*Continued.*

Administering oath to witness—Person acting for court officer.

Perjury may be assigned in respect of statements given in evidence in open court, although the oath was administered to the witness by a person temporarily acting in the place of the proper officer at such officer's request. R. v. COLEMAN, (ONT.) 523

Pharmacy

Unlawfully retailing poisons; Ontario Pharmacy Act. 272

Police Magistrate

Justice of the peace acting in place of.

A justice of the peace acting in the illness, or absence, or at the request of a police magistrate, should be designated as so acting, in warrants or other process; otherwise, the latter will be invalid.

A warrant signed by a justice of the peace so acting, in which he is described as "police magistrate," is void.

R. v. LYONS, (ONT.) 218

Post Office Act (Can.)

Stealing a post letter; decoy letter irregularly posted. 221, 223

Preliminary inquiry

Change of magistrates during. 429, 431

And see JURISDICTION.

Presumptions

Minor under 14—Unnatural offence.

It is to be conclusively presumed that a party is physically incompetent to commit an unnatural offence under Cr. Code, sec. 174, if under the age of fourteen.

Such presumption is not affected by the provisions of Cr. Code, sec. 10, and the latter section refers exclusively to mental capacity to distinguish between right and wrong.

R. v. HARTLEN, (N.S.) 12

Note on presumption of continuance of life; absence for less than seven years. 132

From recent possession of goods stolen. 291, 295

Privilege

See WITNESS.

Profane language

Conviction for using—Omission to set out the words.

A conviction for using profane language on a public street is invalid unless the words complained of are therein set out.

R. v. SARAH SMITH, (N.S.) 485

Provincial legislation

See APPEAL.
See CONSTITUTIONAL LAWS.

Punishment

See PENALTY.

Quashing conviction

See CERTIORARI.
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Quebec

Offence under provincial statute; appeal from conviction. 521
Gratuitous subpœnas, R.S.Q. article 2614. 204
Mixed jury; right of, in Quebec. 320

Railway Act (Can.)

Powers of a 'railway constable'—Offenders taken before justice of another county.

A person summoned but not arrested for trespassing on a railway track, is not liable to be tried elsewhere than in the local jurisdiction wherein the offence was committed.

Section 283 of the Railway Act (Can.) 51 Vict., c. 29, authorizing a railway constable to "take" persons offending against the provisions of that Act, and punishable summarily, before a justice for any county, etc., within which such railway passes, and giving such justice jurisdiction to deal with such a case, as though the offence had been committed "within the limits of his own local jurisdiction," applies only where the offender has been *arrested* by a railway constable.

Semble, the provisions of sec. 283 of the Railway Act apply only to arrests made by a railway constable without a warrant under the provisions of that Act, and not to a case where an information is laid and a warrant is issued instead of a summons to bring the offender before the justice to answer the charge.

R. v. HUGHES, (ONT.) 332

Offences; amendment of 1899. 604

Rape

Verdict of common assault; limitation of time for information on charge of assault; Cr. Code 841. 96

Female under fourteen years—"Woman".

The words "man" and "woman" in the Criminal Code, sec. 266, which defines the crime of rape, are to be taken in a general or generic sense as indicating all males and females of the human race, and not in a restricted sense as distinguished from boys and girls.

Rape—*Continued.*

An indictment for rape under the Criminal Code, secs. 266 and 267, lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding the provisions of sec. 269, which enacts that everyone is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife. R. v RIOPEL, (QUE.) 225

Lesser offence of assault included; Note on limitation of time for summary proceedings for assault. 101

Form of indictment for rape. 101

Receiving stolen goods

Accessory—Convictions for both theft and receiving.

The receiving of goods merely as an act done in the commission of the theft does not constitute a separate offence of receiving stolen property knowing it to have been stolen.

If the accused were not an aider and abettor or a principal in the second degree in the commission of the theft, the circumstance that he was an accessory before the fact by counselling and procuring the commission of the theft, and therefore liable under sec. 61 of the Criminal Code to be convicted as a principal, does not prevent his conviction for the substantive offence of afterwards receiving the stolen property knowing it to have been stolen.

Such an accessory before the fact who afterwards becomes a receiver of the stolen property may be legally convicted both of the theft and of 'receiving.' R. v. HODGE, (MAN.) 350

Note on resumption of possession in transit by owner. 356

Recognizance

See CERTIORARI.

See INDICTMENT.

Reserved Case

Reservation after sentence and during imprisonment.

A reserved case may be granted under Cr. Code 743 at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favour. R. v. PAQUIN, (QUE.) 134

Jurisdiction of presiding judge as a question reserved.

Whether the judge presiding at the trial had jurisdiction to summarily try the defendants is a "question of law" under Cr. Code 743, and may be the subject of a reserved case.

R. v. PAQUIN, (QUE.) 134

Reserved Case—*Continued.*

Where trial judge in doubt.

A reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a Court of Appeal. R. v. LÉTANG, (QUE.) 505

Res gestæ

See EVIDENCE.

Res judicata

By judgment on stated case. 488

Note on res judicata in criminal matters. 496

Return

See HABEAS CORPUS.

Security for Costs

See APPEAL.

Seduction

Evidence—Corroboration.

Evidence of the girl's pregnancy, and of her having been employed in domestic service at the defendant's residence and of facts showing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute the corroborative evidence "implicating the accused" required by Cr. Code, sec. 684, in order to sustain a conviction. R. v. VAHEY, (ONT.) 258

Corroborative evidence on charge of seduction. 258, 261

Smuggling

Commitment.

A warrant of commitment by justices in default of payment of a fine imposed under the Customs Act for smuggling, and under which the accused is required to pay also the expenses of being conveyed to gaol before he can obtain his liberty, is invalid if the amount of such expenses are not stated therein.

A conviction under sec. 192 of the Customs Act (Can.) for clandestinely landing spirits in Canada should show on its face that the goods were subject to duty.

R. v. THOMAS MCDONALD, (N.S.) 504

Speedy Trial

Adjournment—Election to proceed in absence of material witness.

An adjournment of a speedy trial may be made under Cr. Code 777 in order to obtain the attendance of a material witness,

Speedy Trial—*Continued.*

although the party applying for the same had elected to proceed without such witness, and although the trial had commenced. R. v. GORDON, (B.C.) 141

Speedy trial by consent without jury; power of adjournment; Cr. Code 777. 142

Stated Case

Judgment upon a, as res judicata. 488

And see APPEAL.

Statutes

Criminal law amendments, 1897, 1898 and 1899. 593-612

Stifling prosecution

Misappropriation—security for repayment.

All agreements to suppress criminal prosecutions are illegal in the absence of any statutory provision to the contrary.

A covenant for the payment of money, given by the accused and others for the purpose of stifling a prosecution for the alleged embezzlement, prior to the Criminal Code, of partnership property under the Larceny Act R.S.C., c. 164, s. 58 (see Criminal Code 311), is not enforceable.

The Imperial Act, 20 and 21 Vict., c. 54, s. 12, if it be still in force in British Columbia, which it did not become necessary to decide, applies only to trustees guilty of misappropriation of property held upon *express* trusts, and validates an agreement or security given by such a defaulting trustee himself, having for its object the restoration or repayment of any trust property misappropriated, but not an agreement or security given by third parties under no civil obligation to the party wronged, for the purpose of stifling the prosecution.

MAJOR v. MCCRANEY, (CAN.) 547

Note on agreements for stifling prosecutions. 559

Subpœnas

Practice as to gratuitous subpœnas in Quebec. 204

Summons

Summary proceedings—Service on corporation.

Notice of a summons by justices under the Summary Convictions clauses of the Criminal Code may be given to a corporation in a manner similar to a notice of indictment under Cr. Code 637. R. v. THE TORONTO RAILWAY COMPANY, (ONT.) 471

Sureties

To keep the peace; requirements of commitment in default of finding; negativing malice in complaint. 64

Telegram

Legality of arrest on request by telegram from peace officer in another province. 43

Theft

Hotelkeeper's lien—Goods under lawful seizure and detention—Taking away without authority.

An hotelkeeper who locks up the room of a guest containing the latter's baggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's baggage, &c., under 'lawful seizure and detention,' in respect of the landlord's common law lien; and the taking away of such baggage by the guest without the landlord's authority is 'theft' under sec. 306 of the Criminal Code.

The landlord does not by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects; and the owner who removes any baggage as to which the permission does not extend, is guilty of 'stealing' the same under sec. 306 of the Criminal Code.

The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due nor invalidate the lien. R. v. HOLLINGSWORTH, (N.W.T.) 291

Agreement for stifling prosecution—Theft by partner.

A covenant for the payment of money, given by the accused and others for the purpose of stifling a prosecution for the alleged embezzlement, prior to the Criminal Code, of partnership property under the Larceny Act R.S.C., c. 164, s. 58 (see Criminal Code 311), is not enforceable.

MAJOR v. MCCRANEY, (CAN.) 547

Recent possession as evidence of stealing. 291, 295

Assisting to conceal stolen property; 'aiding and abetting'; continuation of a completed crime. 357

Threats

Threatening letter—'Offence', meaning of.

The "offence" to accuse, or threaten to accuse, a person whereof with intent to extort or gain anything from him is made an indictable offence by Cr. Code, sec. 406, need not be an offence under the Code or other Dominion law, but may be an offence under a provincial law. R. v. DIXON, (N.S.) 589

And see MENACES.

Time

Limitation of time for Information on charge of assault.

Cr. Code sec. 841, limiting the time within which an information can be laid "in the case of any offence punishable on summary conviction", applies only to proceedings under the summary conviction clauses of the Criminal Code.

An information may be laid and proceedings taken thereon for the prosecution by indictment of an indictable offence, although the case is one which might have been summarily tried by a justice had the information been laid within the six months' limit provided by Cr. Code sec. 841, and although that period had expired before the laying of the information.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assault is properly followed by a conviction although the information was laid more than six months' after the offence was committed.

THE QUEEN v. EDWARDS, (ONT.) 96

Amendment of information—Limitation of time for prosecution.

An information for illegal selling of liquor under the Ontario Liquor License Act cannot be amended so as to charge an offence of a date more than thirty days before the amendment is made.

The power of amending informations under the Liquor License Act, sec. 104, under which the justice may "substitute for the offence charged therein any other offence" against the Act, is controlled by the limitation of time for laying a fresh information (sec. 95), and as to the substituted offence is to be treated as laid on the date of the amendment.

R. v. HAWTHORNE, (ONT.) 468

Trade

Combinations in restraint of. 605

Trade Mark.

False trade description—Jurisdiction of magistrate.

Magistrates have no summary jurisdiction to adjudicate upon a charge under Cr. Code sec. 448 of selling goods to which a false trade description was applied.

Proceedings upon such a charge against a corporation should be instituted by indictment under Cr. Code secs. 635-639, and not by a preliminary inquiry before a magistrate.

R. v. T. EATON COMPANY, LIMITED, (ONT.) 252

Trespass.

Seizure of goods.

An entry upon land for the purpose of seizing and taking away chattels thereon *bona fide* claimed by the person seizing the same is not a 'forcible entry' under sec. 89 of the Criminal Code, although made contrary to the will of the occupant and in a manner likely to cause a breach of the peace, but is a mere trespass. R. v. PIKE, (MAN.) 314

Trial

See JURISDICTION.

See NEW TRIAL.

Two Offences.

Conviction under Indian Act for 'giving and selling liquor.' 488, 489

Ultra Vires.

See CONSTITUTIONAL LAW.

Uncertainty.

See CONVICTION.

Unnatural Offence.

Minor under 14—Incapacity for crime—Presumption of.

It is to be conclusively presumed that a party is physically incompetent to commit an unnatural offence under Cr. Code, sec. 174, if under the age of fourteen; but he may, if the act be committed against the will of the other party, be punished for an assault under Cr. Code, sec. 260. R. v. HARTLEN, (N.S.) 12

Vagrancy.

No visible means of support—Gaming.

The evidence on a charge of vagrancy laid under Cr. Code 207 on the ground that the accused had for the most part supported himself by gaming and crime must show that the gaming or crime took place during the time within or for which he is charged in the information with having been a vagrant.

If the accused resides for a portion of the year with his parents at their request, they being able and willing to provide for his support, a conviction for vagrancy under Cr. Code 207 (*a*) because "not having had any visible means of maintaining himself he had lived without employment" should be quashed. *Semble*, although it may appear that part of the money by which the accused is supported with his parents had been acquired by him by his gaming, etc., prior to the time of the offence charged, and that the accused while so resident with his parents idled away his time in places of public resort, such does not justify a conviction for vagrancy. R. v. RILEY, (QUE.) 128

Vagrancy—*Continued.*

Husband and wife—Vagrancy by non-support of wife.

In order to constitute a wilful refusal or neglect on the part of a husband to maintain his family, under Cr. Code, sec. 207 (*b*), it is necessary that he should be under a legal obligation to do so, and his failure to maintain his wife, who had left him without valid cause and refused to return, is not an offence under that section. R. v. LECLAIR, (QUE.) 297

Venue

Change of venue—Application for by Crown on ground of popular sympathy for accused—Evidence on.

A change of venue should not be made in a criminal case whereby the trial would be transferred from the county in which the crime is alleged to have been committed, unless facts are proved, as distinguished from sworn opinions, plainly indicating that a fair and impartial trial cannot be had in that county.

A change of venue should not be granted on the ground of popular sympathy with the prisoner and prejudice against the prosecution, where there is nothing to show that the class of citizens from whom the jury would be drawn are likely to be prejudiced except by those feelings which arise from the nature of the offence and which are common in all counties.

R. v. PONTON, (ONT.) 192

Change of venue—Hostile demonstration against judge.

A change of venue may be ordered under Cr. Code 651, on the application of the Crown, where at an abortive trial, at which the jury disagreed, a hostile demonstration was made against the judge by a mob assembled in the streets during a short adjournment of the trial.

The change is rendered "expedient to the ends of justice" (Cr. Code 651), because the conduct of the mob tended to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial; and this notwithstanding the sworn statements of every juror at the abortive trial that they were in no way intimidated or influenced by the mob demonstration, part of which took place within hearing of the jury during their deliberations.

Affidavits from the jurors denying intimidation are properly admissible in evidence on a motion to change the venue where such intimidation is charged. R. v. PONTON (NO. 2), (ONT.) 417

Change of venue—Terms concerning additional expense.

An order for change of the place of trial (Cr. Code 651) is not open to objection on the ground that it makes no provision for

Venue—*Continued.*

the additional expense to which the accused might be put by the change, if the judge making such an order was not asked to make an order as to such additional expense, and if it was not shown to such judge that additional expense would be occasioned. R. v. COLEMAN, (ONT.) 523

Change of venue—Addition of new charge in indictment.

Where after a committal for trial for an offence under the Criminal Code, an order is made changing the place of trial to another county, an indictment may be preferred in the latter county not only for the offence for which the accused was committed for trial, but for any other offence disclosed in the depositions taken before the committing justice.

R. v. COLEMAN, (ONT.) 523

Warrant

See ARREST.

See COMMITMENT.

Waiver

Note on waiver in criminal cases. 93

See INFORMATION.

See OBJECTION.

Wife

See HUSBAND AND WIFE.

Withdrawal

Of comments on prisoner's failure to testify. 523

Witness

Privilege from arrest—Offence committed by witness while away to give evidence.

The privilege from arrest allowed to a witness summoned before a Court sitting in another judicial district from that in which he lives, does not apply where he is charged with a criminal offence committed by him during the time in which he is in such district for the purpose of giving evidence.

EX PARTE ROBERT EWAN, (QUE.) 279

Privilege from incriminating answers—Separate indictment against, for receiving stolen goods.

A witness who is not a party to the indictment for theft submitted to the jury, cannot be excused from answering questions on the ground that he himself is indicted with another as receiver of the goods stolen, and that his answers might

Witness—*Continued.*

incriminate him; but his objection should be noted and the evidence should not be used against him at his trial.

R. v. McLINEHY, (QUE.) 416

Note on protection of witnesses from arrest. 281

Words and Phrases

"Aiding and abetting." 357
"Details" of the circumstances. 339, 348
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"False document." 562
"Full answer and defence." 410, 414, 513
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